OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. [redacted] 63

MORGAN C. CHEWNING, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR CERTIORARI FILED AUGUST 1, 1960
CERTIORARI GRANTED MARCH 6, 1961

Supreme Court of the United States

OCTOBER TERM, ~~1960~~ 1961

No. ~~783~~ 63

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[fol. 1] • • • •

[fol. 2] [File endorsement omitted]

VIRGINIA:

IN THE LAW AND EQUITY COURT OF RICHMOND

MORGAN C. CHEWNING, PETITIONER

vs.

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary at Richmond, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM—Filed September 24, 1959

To the Honorable Robert Lewis Young, Judge of Said Court:

COMES NOW, Morgan C. Chewning, by mail, on this 21 day of Sept., 1959, respectfully complaining and stating that he is unlawfully, unjustly and illegally imprisoned, detained, confined, restrained and deprived of his liberty in the Virginia State Penitentiary located at 500 Spring Street, Richmond, Virginia, by the respondent, W. Frank Smyth, Jr., Superintendent of said Peniteniary; that the said W. Frank Smyth, Jr., respondent, maintains his right to keep and hold the petitioner in confinement in said Virginia State Penitentiary under and by virtue of certain records and papers of commitment, to-wit:

An information filed by the respondent hereof, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, at Richmond, Virginia, in the Circuit Court of the City of Richmond, Virginia during the month of June, 1958, that alleged the conviction of said Morgan C. Chewning for three (3) offenses (felonies) against the Commonwealth of Virginia, and said convictions resulted in confinement in the Virginia State Penitentiary on all three offenses; and said information alleged that said Morgan C. Chewning is the same person so named in the records on three previous convictions and penitentiary sentences as set out above, that on the 25th day of June, 1958, the said Morgan C. Chewning was called before the Court to

answer to the information filed by the respondent, and that the said Morgan C. Chewning was sentenced by the Circuit Court of the City of Richmond, Virginia, to imprisonment in the Virginia State Penitentiary for the space and period of ten (10) years, but with one (1) year of said ten-years suspended, to commence upon the expiration of the sentence he was then serving.

[fol. 3] Your petitioner further says that his imprisonment, detention and confinement in the Virginia State Penitentiary is illegal and that the illegality thereof consists in this, to-wit:

That the Circuit Court of the City of Richmond, Virginia proceeded to try and convict, and sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year of said sentence suspended, without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958.

Your petitioner further says that in the Courts of the Commonwealth of Virginia, before an accused person can be tried and convicted, and sentenced to imprisonment in the Virginia State Penitentiary, if he is without the aid of a competent attorney at law to represent him, that under the provisions of Section 19-214.1 of the Code of Virginia (1952), and Article I, Section Eight of the Constitution of the Commonwealth of Virginia, the Court must first appoint to the accused, an attorney at law to represent him; that said Section 19-214.1 of the Code of Virginia, reads:

"Acts of Assembly, 1952, Chapter 348.

"Section 19-214.1. Appointment of defense counsel in felony cases.—In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, *shall by order entered of record appoint an attorney at law to represent him.*" (Emphasis added).

That Section Eight of the Constitution of Virginia declares that "no person shall be deprived of life or

liberty, except by the law of the land", and that in *Watkins* v. *Commonwealth*, 174 Va. 518, the Supreme Court of Appeals of Virginia declared that the right to have the assistance of counsel is one of the rights guaranteed to an accused under this States Bill of Rights, by saying:

> "While there is no specific provision in the constitution of Virginia guaranteeing to persons accused of crime the right to have the assistance of counsel, in *Barnes* v. *Commonwealth*, 92 Va. 794, 803 SE, 23 S.E. 784, this court recognized the right to be a fundamental one. It is, we think, one of the rights guaranteed to an accused under our Bill of Rights. Virginia Constitution, Section 8."

[fol. 4] Your petitioner further says that the said Circuit Court of the City of Richmond, Virginia, on the 25th day of June, 1958, did not have the jurisdiction, power and authority, to proceed against the petitioner, to convict the petitioner, and to sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year suspended, without the assistance of counsel to represent him.

Your petitioner further says that said ten-year sentence, with one-year suspended, was void because the Circuit Court of the City of Richmond failed to comply with the laws of the Commonwealth of Virginia, to-wit: Section 19-214.1 of the Code of Virginia, and the Supreme Court's ruling in *Watkins* v. *Commonwealth*, 174 Va. 518, then in effect in the Commonwealth of Virginia; and which statute and ruling of law was, and is still in effect.

Your petitioner says that he is without adequate remedy save in this proceeding of habeas corpus.

WHEREFORE, AND BY REASON THEREOF, your petitioner prays that a writ of habeas corpus ad subjiciendum be granted and directed to the said W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, and made returnable to this Court, on or before the 7 day of Oct., 1959, commanding him to have the body of your petitioner before your Honorable Court, or before the Judge thereof in vacation, at a time and place to be specified, together with the records of said penitentiary

as to the period of time and cause of your petitioner's detentions; that the said order and judgment of said Circuit Court of the City of Richmond, Virginia, sentencing your petitioner to imprisonment in the penitentiary in the State of Virginia for the space and period of ten-years, with one year suspended, may be set aside and held for naught; that your petitioner be immediately and forthwith released from confinement in the Virginia State Penitentiary at Richmond, Virginia, and for such other and further relief as this Court may deem proper in the premises. And as in duty bound your petitioner will ever pray, etc.

Respectfully submitted,

/s/ Morgan C. Chewning, Petitioner
Virginia State Penitentiary at Richmond

Copy of the foregoing furnished
Respondent herein on

[fol. 5] Duly Sworn to by Morgan C. Chewning.
Jurat Omitted in Printing

[fols. 6-12] • • • •

[fol. 13] EXHIBIT "H" TO PETITION

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND COMMONWEALTH OF VIRGINIA

INFORMATION—

BE IT REMEMBERED, that T. Gray Haddon, Attorney for the Commonwealth of Virginia, in and for the Circuit Court of the City of Richmond, who, for the said Commonwealth prosecutes in this behalf, cometh on the 25th day of June 1958, into the said Circuit Court of the City of Richmond and giveth the Court to understand and be informed that M. C. Chewning a convict in the penitentiary of Virginia, heretofore was convicted of three offenses against the laws of this Commonwealth, then and now punishable by confinement in the penitentiary, and was sentenced to confinement in the said penitentiary for the said offenses and was received into the said penitentiary in pursuance of said sentences, which said convictions will more fully and at large appear by reference to the records thereof, duly certified copies of which are here produced and shown to the Court. And the said Attorney for the Commonwealth giveth the Court further to understand and be informed, that the said convict is the identical person mentioned in each of the aforementioned records.

And the said Attorney for the Commonwealth giveth the Court here further to understand and be informed, that the said convict hath not been sentenced to the punishment by law prescribed for such third offense.

Whereupon the said Attorney for the Commonwealth prays the consideration of the Court herein the premises, and that due process of law be awarded against the said convict in this behalf, to make him answer to the said Commonwealth touching and concerning the premises aforesaid, and that such proceedings may be had there-

upon as are directed and required by the Acts of the General Assembly in this case made and provided.

/s/ T. Gray Haddon
Attorney for the Commonwealth

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by E. M. Edwards /s/t/ D.C.

REVERSE SIDE
82

COMMONWEALTH

vs.

M. C. Chewning

AN INFORMATION
JUN 25 1958

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by E. M. Edwards /s/t/ D.C.

[fol. 14] EXHIBIT "B" TO PETITION

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Information (Third conviction)

COMMONWEALTH OF VIRGINIA, PLAINTIFF

against

M. C. CREWNING, ET AL, DEFENDANTS

SENTENCE—June 25, 1958

The Superintendent of the Penitentiary this day produced the above named defendants, and made report in writing that the foregoing named convicts had been three times convicted and sentenced to confinement in the Penitentiary for a felony; and

THEREUPON, the Attorney for the Commonwealth filed information setting forth the several records of conviction and alleging the identity of each with the person named in each, the information being read to each of the accused, and each being first cautioned as to his rights, and each acknowledged in open court that he is the person mentioned in the several records of conviction.

It is, therefore, CONSIDERED by the Court that each of the foregoing named convicts undergo a further confinement in the Penitentiary for a term of ten years, said term to begin at the end of the present term or terms of confinement of each in said Penitentiary.

But for reasons appearing to the Court, it is ordered that one year of the said sentence be suspended during the good behavior of the said defendants.

And the said prisoners are remanded to the custody of the Superintendent of said Penitentiary.

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by E. M. Edwards /s/t/ D.C.

[fol. 15] • • • •

[fol. 16] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

ORDER APPOINTING COUNSEL—October 16, 1959

The petition herein praying that the Court assign an attorney at law to represent the petitioner in this proceeding, and the court, from an examination of the petition, being of the opinion that the petitioner is in need of the services of counsel but unable to engage counsel of his own choice on account of his poverty within the intent of Code Section 14-180, the Court, with his consent, doth appoint Robert N. Pollard, Jr., Esquire, of the Richmond Bar, to represent the petitioner herein.

Enter

[init.] R. L. Y.
Oct. 16, 1959

[fol. 17] • • • •

[fol. 18] IN
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

Richmond, Virginia

OPINION—February 5, 1960

Robert N. Pollard, Jr., Esq.,
Williams, Mullen, Pollard & Rogers, Attys,
1001 East Main Street,
Richmond 19, Virginia.

Re: Morgan C. Chewning v. Frank W. Smyth, Jr.,
Law No. A-3082.

My dear Mr. Pollard:

First of all I wish to thank you for the careful attention which you have given this matter. After reading the authorities cited, as well as others, my conclusion is that the failure to furnish counsel to Mr. Chewning at his request does not invalidate the sentence given him under Virginia Code Section 53-296. In keeping with this conclusion, I have this day entered an order denying the writ and dismissing the petition.

As to the mandate of the Fourteenth Amendment to the Constitution of the United States, here relied upon, the converse has been adjudicated. In Gryger v. Burke, 334 U.S. 728, where release or habeas corpus was sought on the ground that petitioner was without counsel at his recidivist hearing, Mr. Justice Jackson said, in part, as follows (at p. 731):

> ". . . the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid."

This holding was adhered to in Chandler v. Fretag, 348 U.S. 3, where it was decided that, while a State is not required under the Fourteenth Amendment to furnish counsel, it cannot deny the defendant in a repeater hearing of the right to be heard by counsel of his own choice.

The difficulty in this case, more apparent than real, comes from the fact that under our habitual criminal statute the proceeding for sentencing the convict to the penitentiary for an additional term is separate from his trial on the last offense committed. Were our statute of the other type, that is, of the type where the proceedure for imposing the additional penalty for being an habitual criminal is a part of the prosecution for the last committed offense, under our law the accused would have counsel. [fol. 19] Since with us the two proceedings are separate, the petitioner here argues that when charged as a habitual criminal he is charged with a separate offence, and, therefore entitled to counsel.

It is true that the proceeding set out in Code Section 53-296 is a criminal, rather than civil, one. *Wright's Case,* 109 Va 847. It is also true that the defendant in such a proceeding has the same rights to a speedy trial, to time for preparation, to insistance of counsel of his own choice, to compulsory process for witnesses, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to most other rights enjoyed by a defendant on trial for a criminal offense. 25 Am. Jur. 278, Hab. Crim., Sec. 31. The fallacy of the petitioner's argument in this regard, however, is that the information filed against him did not charge the commission of a new separate offense. The proceeding thus instituted was only connected with the measure of punishment for the last-committed crime. 25 Am. Jur. 260; 24 C.J.S. 1143.

In King v. *Lynn, Penitentiary Superintendent,* 90 Va. 345, a petition for habeas corpus was filed in the Supreme Court of Appeals of Virginia attacking the validity of a sentence imposed upon him as a second offender under Sections 4179 through 4183 of the Code of 1887, substantially like our present Section 53-296. The Court, in denying the writ said that the grounds of attack were "bottomed upon the assumption that the prisioner stands in the position of a person charged with a crime in the first instance" but that "manifestly this case has no analogy to that."

In Michie's Jur. Vol. 5, p. 443, the text is in part as follows:

> "But such a statute does not make it an offense or crime for one to have been convicted more than once. Former conviction is not an integral part of the second or new offense. The law simply enjoins a longer sentence because of a former conviction. It does not prosecute and punish for the former conviction. It cannot do that. It adds punishment for the crime as to which one is lastly convicted because of the class to which he belongs. The sentence is an incident to the last offense alone. But for that offense it would not be imposed. So proceedings made under such statute cannot be said to constitute a holding to answer for crime or a placing in second jeopardy for an offense. They are merely ancillary proceedings for [fol. 20] the rightful sentence which the law mandatorily enjoins upon those already held or jeopardized."

Mr. Justice Hughes, in *Graham* v. *West Virginia,* 224 U.S. 616, dealing with a proceeding under a West Virginia Statute taken from an earlier form of our present Code Section 53-296, said as follows (at p. 624):

> *"By this proceeding he was not held to answer for an offense; the information did not allege crime.* As was said by the Supreme Court of Appeals of West Virginia: "It (the information) alleges that he has been held to answer for crime, and that he stands convicted of it through the indictment of a grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened.'" (underscoring supplied)

Our Code Section 19-214-1, relating to the appointment of defense counsel applies to "any case in which a person is charged with a felony." Section 8 of the Virginia Constitution, as interpreted in *Watkins* v. *Com.,* 174 Va. 518, 522, is applicable to the case of "persons accused of crime."

It thus appears that there is no requirement under the State or Federal Constitution, nor is there any Virginia statute, requiring that the Circuit Court of the City of Richmond assign counsel to persons brought before it under Code Section 53-296.

Yours very truly,

/s/ Robert Lewis Young

RLY/b

[fol. 21] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—
February 5, 1960

The court having fully considered the petition herein, and exhibits therewith, and the argument of counsel for the petitioner, appointed with his consent by the court, and having maturely considered of its decision to be rendered thereon, finds no probable cause to believe that petitioner is detained without lawful authority. Therefore, it is ordered that the writ of habeas corpus herein prayed for be denied, to which action of the court the petitioner, by counsel, excepted.

And the services of Robert N. Pollard, Jr., Esquire, contemplated by the order herein of the 16th day of October, 1959, having been fully and ably performed, the Court doth discharge him from any further responsibility in this matter, with sincere appreciation.

Enter

[init.] R. L. Y.
Feb. 5, 1960

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by /s/ Edward G. Kidd D.C.
OB 37 p 3

[fols. 22-36] • • • •

[fol. 37] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

ORDER RE MOTION FOR RECONSIDERATION—March 1, 1960

Mr. Morgan C. Chewning
500 Spring Street
Richmond, Virginia

Re: *Chewning* v. *Smyth etc.*

My dear Mr. Chewning:

I have your document entitled "Motion for Reconsideration" and have lodged the same with the papers in the above entitled proceding. So far as I am informed there is no provision in the law for such a motion. Out of interest, however, I have read it and find nothing not already urged in your behalf and considered.

While I realize that you are entirely sincere in your views, you must realize that this court has fully performed its function. Feeling aggrieved by the decision herein of February 5, 1960, as you apparently do, you should petition the Supreme Court of Appeals of Virginia for a writ of error, remembering that the mailing to me of the "Motion for Reconsideration" does not affect the time within which notice of appeal must be filed and other procedural steps taken. Should you request it, you may rest assured that the Clerk of this Court will be happy to prepare and transmit a transcript of the record in this proceeding to the appellate court without cost to you.

Very truly yours,

/s/ Robert Lewis Young

RLY/e

[fol. 38] [File endorsement omitted]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

NOTICE OF APPEAL—Filed March 10, 1960

To the Honorable Robert Lewis Young, Judge of Said Court:

COMES Now, your Appellant, Morgan C. Chewning, by mail, on this 7th day of March, 1960 said appellant heretofore being the petitioner in an application for the writ of habeas corpus ad subjiciendum, addressed to this Honorable Court, to declare null and void a nine (9) year penitentiary sentence unlawfully imposed upon the appellant by the Circuit Court of the City of Richmond, Virginia on the 25th of June, 1958; And, upon which application to this Court, the Court, by an Order entered on February 5th, 1960, denied the writ of habeas corpus heretofore prayed for without a hearing and without requiring the respondent—appellee hereof to show cause; And, due to said denial of the appellant's prayer, the appellant does now move and does hereby give notice of his desire to appeal from the order and final judgment, erroneously rendered in this case to the Supreme Court of the Commonwealth of Virginia.

Appellant prays that this Court allow this appeal to be made in forma pauperis, as it is made in good faith upon the part of the appellant; And, that this Court, by an Order entered of record, cause the entire record and proceedings in this cause, together with the Court's permission to appeal, and the assigned errors herewith attached and made a part of the record, to be sent and transmitted to the Clerk of the Supreme Court of Appeals of Virginia.

Respectfully submitted,

/s/ Morgan C. Chewning
MORGAN C. CHEWNING, Petitioner-Appellant
Virginia State Penitentiary
Richmond, Virginia

[fol. 39] [File endorsement omitted]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 10, 1960

To the Honorable Robert Lewis Young, Judge of Said Court:

COMES Now, your appellant, above named, heretofore the petitioner in an application for the writ of habeas corpus ad subjiciendum, said petition and prayer being denied on the 5th day of February, 1960 setting forth to this Honorable Court, his Assignment of Errors as required by Rule 5 : 1, Section 4, of the Rules of the Supreme Court of Appeals of Virginia:

These particular Assignment of Errors are:

1. The Court erred in rejecting and denying the petition for a writ of habeas corpus ad subjiciendum without a hearing where evidence and argument could be heard.
2. The Court erred in holding that failure to furnish counsel to the petitioner at his request does not invalidate the sentence given him under Virginia Code Section 53-296.
3. The Court erred in holding that it finds no probable cause to believe that petitioner is detained without lawful authority.
4. The Court erred in holding that the rule of Watkins v. Com., 174 Va. 518, 522, is applicable to the case of "persons accused of crime" only.
5. The Court erred in sustaining the judgment of conviction and sentencing and refusing the release and discharge of the petitioner.

WHEREFORE, your appellant prays this Honorable Court to cause the records in this case, together with this Court's permission to appeal the aforesaid, to be sent to the

Supreme Court of Appeals of Virginia as heretofore requested.

And this your appellant does forever pray.

Respectfully submitted,

/s/ Morgan C. Chewning
MORGAN C. CHEWNING, Petitioner-Appellant
Virginia State Penitentiary at Richmond

Copy furnished Appellee
3/7/60

[fol. 40] [File endorsement omitted]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

REQUEST FOR RECORD—Filed March 10, 1960

COMES Now, the Appellant, Morgan C. Chewning, by mail, and in conjunction with his "Notice of Appeal" and "Assignment of Errors", does hereby request that the following records and papers be forwarded to the Clerk of the Supreme Court of Appeals of Virginia:

1. Petition for a Writ of Habeas Corpus Ad Subjiciendum, with accompanying Memorandum in Support, to include the Exhibits filed therewith on September 21, 1959.
2. Letter from this Court to Robert N. Pollard, Jr., date February 5th, 1960, said letter bearing the form of an opinion.
3. Final Order of Judgment entered February 5, 1960 wherein the habeas corpus hereinbefore prayed by the petitioner was denied by this Court.

Appellant states that the forwarding of the above is both needful and necessary in order than an appeal may be perfected from the judgment of this Honorable Court.

Respectfully submitted,

/s/ Morgan C. Chewning
MORGAN C. CHEWNING, Petitioner-Appellant
Virginia State Penitentiary at Richmond

[fol. 41] IN THE
SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

Record No. .....

MORGAN C. CHEWNING, PLAINTIFF IN ERROR

versus

W. FRANK SMYTH, JR., DEFENDANT IN ERROR

PETITION FOR WRIT OF ERROR—Filed March 22, 1960

To the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

This is an appeal by Morgan C. Chewning, petitioner below, from a judgment rendered against him, entered in the Law and Equity Court of the City of Richmond, on the 5th day of February, 1960.

For convenience, the Plaintiff in Error will be referred to as the petitioner, and the Defendant in Error shall be referred to as the respondent.

The record in this case, including a written opinion by the Court below, duly certified, will be transmitted by the Clerk of the Court below to this Honorable Court as requested by the petitioner on the 7th of March, 1960.

PROCEEDINGS IN THE LOWER COURT

This appeal grows out of an application for the writ of habeas corpus ad subjiciendum, submitted on the 21st of September, 1959, wherein the petitioner complained that he was being illegally and unjustly held in confine-[fol. 42] ment by the respondent due to the violation of his Constitutional Right to the assistance of counsel when proceeded against as a third offendor under Section 53-296 of the Code of Virginia in the Circuit Court of the City of Richmond on the 25th of June, 1958. The petitioner complained that the sentence imposed upon him by the said Circuit Court for the space and period of nine (9) years was null and void and ought to be set aside because he was refused the right to have the assistance of

counsel for his defense upon his request. On February 5th, 1960, the Court below denied and dismissed the prayer of the petitioner with a written opinion in the form of a letter, to which action of the Court the petitioner excepted.

Assignments of Error

The petitioner respectfully assigns the following errors:

1. That the Court erred in rejecting and denying the petition for a writ of habeas corpus ad subjiciendum without a hearing where evidence and argument could be heard.
2. That the Court erred in holding that failure to furnish counsel to the petitioner at his request does not invalidate the sentence given him under Virginia Code Section 53-296.
3. That the Court erred in holding that it finds no probable cause to believe that petitioner is detained without lawful authority.
4. That the Court erred in holding that the rule of *Watkins* v. *Com.*, 174 Va. 518, 522, is applicable to the cases of "persons accused of crime" only.
5. That the Court erred in sustaining the judgment of conviction and sentencing and refusing the release and discharge of the petitioner.

Statement of Facts

On the 25th of June, 1958, T. Gray Haddon, Attorney for the Commonwealth, in and for the Circuit Court of the City of Richmond, filed an Information against the petitioner, an inmate of the Virginia Penitentiary, alleging that the petitioner had heretofore been convicted of three (3) offenses against the laws of this Commonwealth, then and now punishable by confinement in the penitentiary in pursuance of said sentences and was received into the [fol. 43] said penitentiary in pursuance of said sentences, and that the petitioner was the identical person mentioned in the information.

That the petitioner was put before the Court on the 25th of June, 1958 upon the information filed by the said Attorney for the Commonwealth, and a previous information

submitted by the respondent hereof, and after having the information read to him, the petitioner requested the Court to assign and give the petitioner the assistance of counsel for his defense and protection; That upon such request being made, the Court denied the assistance of counsel, and proceeded to sentence the petitioner to further confinement in the said penitentiary for the space and period of ten (10) years; But, for reasons appearing to the Court, one (1) year of said sentence was suspended upon the condition of good behavior.

ARGUMENT

FIRST ISSUE: Did the Court err in denying the petition for the writ of habeas corpus ad subjiciendum without a hearing; and did the Court err in ruling that no probable cause had been shown by the petitioner; and did the Court err in sustaining the Order of Commitment of the Circuit Court of the City of Richmond (Assignments of Error numbers 1, 3 and 5)?

Since no hearing was held on the petitioner's prayer for relief, Assignments of Error 1, 3 and 5 are nearest to the heart of the matter, and to avoid repetition will be included in the argument of the first issue.

This case is governed by the rights of an accused, or defendant, under Section Eight of the Virginia Constitution, and the 14th Article of Amendment of the Constitution of the United States.

Petitioner contended in his prayer for relief from illegal confinement, that the sentence imposed upon him on June 25th, 1958 was null and void because he was denied the assistance of counsel. That the assignment of counsel to a defendant in a criminal case, is of a Constitutional nature, cannot be denied. Further, the right to the assistance of counsel is provided for by Section 19-214.1 of the Code of Virginia, where we find:

"Section 19-214.1. Appointment of defense counsel [fol. 44] in felony cases.—In any cases in which a person is charged with a felony and is not represented by counsel, *the court, before accepting the plea of such person, shall by order entered of record appoint an*

attorney at law to represent him." (Underscoring supplied)

This is the Section of law in Virginia which guarantees every person facing a penitentiary confinement, the right to the aid of counsel. It is not just a mere Statutory provision, but an extension of the interpretation of the contents of Section Eight of the State's Constitution, and of the 14th Amendment to the National Constitution. When this right has been violated, then the defendant has not been afforded a trial within the aegis of the Constitutions involved.

Perhaps the most firmly settled decision concerning the granting of a hearing upon the submission of a petition for a writ of habeas corpus, is that of *Comm. of Pa. ex rel Stephen J. Herman* v. *John W. Claudy,* No. 45, October Term, 1955, Sup. Ct. of the United States, where, on January 6, 1956, the learned Justices of the highest Court of this Country stated as follows:

". . . It is true that the trial record shows that petitioner told the judge that he was guilty and said 'I throw myself at the mercy of the court, your honor', but neither these nor any other statements made before the trial judge at that time are in themselves sufficient to refute as frivolous of false the serious charges made by the petitioner concerning matters not shown by record. See *Palmer* v. *Ashe,* 342, U.S. 134, 137. It is entirely possible that petitioner's prior confession caused him, in the absence of counsel, to enter the guilty plea. Moreover, the number and complexity of the charges against petitioner, as well as their seriousness, create a strong conviction that no layman could have understood the accusations and that petitioner should, therefore have been advised of his right to be represented by counsel. We cannot agree with the Pennsylvania Superior Court that the mere fact that petitioner had, without the benefit of counsel, pleaded guilty to an offense 2 years before showed that he had the capacity to defend himself against the 30 charges here. We Held in *Gibbs* v. *Burke,* 337 U.S. 773, that in spite of Gibb's conviction

in 6 prior criminal cases the circumstances showed he was entitled to the benefit of counsel. In *Uvegas* v. *Pennsylvania,* 335 U.S. 437, where the facts were strikingly similar to those presented here, we held that representation by counsel was required by Due Process of law Clause. * * * The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."

The Court then said:

[fol. 45] "The chief argument made by the State here in support of the Court's summary dismissal of the petition is this:

"Counsel for petitioner argues that since facts are alleged in the petitioner, a hearing must be held. Since our answer contradicted the allegations in the petition, the lower court was not required to grant a hearing. This contention was sustained by the Superior Court.' *We cannot accept this argument. Under the allegations here petitioner is entitled to relief if he can prove his charges.* He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers." (underscoring supplied).

As this case shows, the question of counsel is a constitutional one under the Due Process Clause of the 14th Amendment, and when raised, a hearing to determine the stability of the facts alleged, must be granted.

Thus, probable cause was shown as required by Section 8-596 of the Code of Virginia, and upon the submission of a substantially firm constitutional issue, it was the duty of the Court to grant the writ and hold a hearing where evidence and argument could be heard. See *Behrens* v. *Hironimus,* (W.Va.), 166 F.(2d) 245. And, in view of the past findings of this Honorable Court, and many other high tribunals, it was the duty of the Court below to grant immediate relief to the petitioner from his illegal confinement.

SECOND ISSUE: Did the Court below err in ruling that the failure to furnish counsel to the petitioner at his request did not and does not invalidate the sentence given him under Virginia Code Section 53-296 (Assignment of error number 2)?

First, the need for the assistance of counsel must be firmly established, to determine whether or not the mandate of the 14th Amendment has been violated.

The Court below held that an accused's rights are not violated when the Court fails to give assistance of counsel to one meeting a fourth offendor charge under the decision of *Gryger* v. *Burke,* 334 U.S. 728, to which reference, petitioner points out, that the *Gryger case* does not apply in this case, and even if it did, has no substantial meaning where counsel is *specifically requested* by the accused.

A close scrutiny of the *Gryger case,* shows us that the case was decided by a split decision, and not only on the [fol. 46] question of counsel, but other issues. In the Gryger case also, was a person who had been arrested eight times for crimes of violence, followed by pleas of guilty or conviction, and in two of such former trials had been represented by counsel. In the petitioner's case we have no such criminal record involved. Not only is there a complete lack of crimes of violence in the petitioner's case as shown by his previous record, but there is the strong fact that he did request counsel at his recidivist hearing. In the Gryger case it plainly sets out that the accused did not attempt to request or exercise his constitutional right. It is further shown by the Court's decision in the Gryger case, that the Court felt that such a man, one who had been arrested and convicted eight times, could not possibly be ignorant of his right to the assistance of counsel, and since this was the case, the Court obviously was under the impression that Gryger knew what he was doing at the time of his hearing when counsel was not requested.

The need for counsel at a Virginia recidivist hearing is one of greatest importance. There are many defenses which may be offered to the Court by a competent and trained legal mind. Perhaps the main defense to be offered as a bar to sentencing, is that one of the defendant's previous convictions was null and void, and that

therefore, the defendant cannot be considered as a third offender. But, how is a defendant, standing alone, expected to raise such a question when it concerns a past conviction?

In *Townsend* v. *Burke*, 334 U.S. 736 (1948), the Supreme Court ruled, in a similar case, that "*the trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding* * * *". Thus it would seem, that in denying the defendant his request for the assistance of counsel, that there is something hidden in his criminal records. That this is so, is also evidenced by the fact, that the vast majority of the defendants at a recidivist hearing, that are represented by counsel of their own choosing, are given a lesser sentence than those who are not represented. Petitioner says without hesitation, that fifty percent or better of the sentences given those inmates represented by counsel is suspended in the majority of the cases.

Petitioner says that the need for the assistance of [fol. 47] counsel is also evidenced by the fact that Section 53-296 of the Virginia Code is used with discrimination because it is not fully complied with. The section of law under which recidivist are sentenced declares that information shall be filed against all inmates who have previously been confined "in any penitentiary within the United States." However, this provision is not complied with because only those inmates who have previously been confined in the Virginia penitentiary are proceeded against. This petitioner maintains, that this discrimination between persons, is a willful and deliberate violation of a defendant's right to the equal protection of the laws. See *Lanzetta* v. *New Jersey*, 306 U.S. 451, 455 (1939), where the Court, speaking on Statutes, said:

> "For it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

See also the cases of *Virginia* v. *Rives*, 100 U.S. 313 (1880); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Barbier* v. *Connally*, 113 U.S. 27 (1884), and *Truax* v. *Corrigan*, 257 U.S. 312 (1921)

where the Supreme Court of the United States has spoken out against the denial of the Equal Protection of the Laws, a denial of the rights of a defendant under purvue of the 14th Amendment to the National Constitution.

In Virginia the question of the assignment of counsel at a recidivist hearing, to petitioner's knowledge, has never been fully stated by this tribunal. A thorough search of available material fails to reveal any decision of this Court where the confinement of a recidivist has ever been collaterally attacked on habeas corpus concerning the denial of counsel at a proceeding under Section 53-296 of the Virginia Code. However, petitioner takes the stand that the proceedings under Section 53-296, since they are criminal in nature (*Wright's* Case, 109 Va. 847), that the situation must be treated the same as any felony conviction; And, since the proceedings are of a criminal nature, and do result in confinement in the penitentiary for a term of more than one year, Section 19-214.1 of the Virginia Code directly applys. This Section of law, as heretofore pointed out, makes it mandatory that counsel be assigned to one standing alone before the Bar of the Court. Fur-
[fol. 48] ther, this Court, in *Fitzgerald* v. *Smyth*, Sup.Ct. of Va., March 9, 1953, 74 S.E. 2d 810, firmly stated that the right to the assistance of counsel upon request, was a fundamental right to a defendant in a criminal proceeding under the provisions of Section Eight of this States Constitution and the 14th Amendment of the National Constitution. Perhaps the boldest and most outstanding statement of this Court in this case was when it said:

> "A refusal of a request for aid of counsel is an invasion of his rights."

THIRD ISSUE: Did the Court err in holding that the rule in *Watkins* v. *Com.*, 174 Va. 518 applied only to those persons accused of crime (Assignment of Error number 4)?

As shown by the Court's opinion, it's interpretation of Section 19-214.1 of the Virginia Code, and of *Watkins* v. *Com.*, 174 Va. 518, is that it applies only to those specifically charged with crime. That may be so; But, is the recidivist hearing not a part of that original charge ac-

cording to the same opinion of the Court below? The Court has stated that it is an ancillary proceeding, and by saying that, it has stated that without the conviction in the first instance, there can be no penalty imposed under Section 53-296. To petitioner, it appears that the Court has made a complete about face from its ruling in the *Newsom* v. *Smyth* case decided on June 3, 1959, wherein the same Court which denied the petitioner relief, declared that an accused is entitled to the assistance of counsel, and that no Court may accept a plea from a defendant not represented by counsel. Is this a fair interpertation of the law?

The Court relied partially upon the case of *Chandler* v. *Fretag*, 348 U.S. 3 in the denial of the petitioner's prayer. Did not the United States Supreme Court in the Chandler case, cite the case of *Powell* v. *State of Alabama*, 287 U.S. 68, which applied the right to assistance of counsel to an habitual criminal as well as one accused of a crime?

Chandler was charged with being an habitual criminal, which this Court and many cited authorities claim is not a crime. Yet, the United States highest Court treated it identically like it would where one was actually accused of crime instead of being an habitual criminal. Therefore this Court, by virtue of the Chandler case, cannot claim that the right to assistance of counsel pertains to only [fol. 49] those actually accused of crime.

Further the doctrine outlined in *Watkins* v. *Com.*, 174 Va. 518, is clearly stated, as to include all persons who are involved in proceedings subjecting the defendant to forfeit his life or liberty. The Virginia Supreme Court, citing the *Barne's Case*, 92 Va. 794, said that the right to assistance of counsel was a fundamental one; And, one of the rights guaranteed under Section Eight of the Constitution of Virginia.

Petitioner respectfully submits, therefore, that this action of the Court below constituted reversible error.

Conclusion

For the foregoing reasons and errors assigned, the petitioner prays that a writ of error be granted from said judgment and that same be reversed and judgment be awarded by this Court in favor of the plaintiff in error.

Petitioner desires to state orally the reasons for granting a writ of error. This petition is adopted as the opening brief.

Petitioner certifies that a copy of this petition was on the 15 day of March, 1960, delivered to the office of the defendant in error, at his office, located at 500 Spring Street, Richmond, Virginia.

Petitioner certifies that this petition is being delivered, by mail, to the Honorable C. Vernon Spratley, Associate Justice of the Supreme Court of Appeals of Virginia, at Richmond, Virginia, on the 15 day of March, 1960.

Respectfully submitted,

/s/ Morgan C. Chewning, Plaintiff in Error

I, Morgan C. Chewning, do hereby certify that in my opinion the judgment complained of in the foregoing petition ought to be reviewed by this court.

/s/ Morgan C. Chewning, Plaintiff in Error

[fol. 50] [File endorsement omitted]

IN THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA IN THE CITY OF RICHMOND

ORDER REFUSING PETITION FOR WRIT OF ERROR—
June 14, 1960

The petition of Morgan C. Chewning for a writ of error to a judgment rendered by the Law and Equity Court of the City of Richmond on the 5th day of February, 1960, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and W. Frank Smyth, Jr., Superintendent, etc., was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the Law and Equity Court.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 52] SUPREME COURT OF THE UNITED STATES

No. 276 Misc., October Term, 1960

MORGAN C. CHEWNING, PETITIONER

vs.

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary

ORDER OF SUBSTITUTION—March 6, 1961

ON CONSIDERATION of the motion to substitute W. K. Cunningham, Jr. in the place of W. Frank Smyth, Jr. as the party respondent in this case,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 6, 1961

[fol. 53] SUPREME COURT OF THE UNITED STATES

No. 276 Misc., October Term, 1960

MORGAN C. CHEWNING, PETITIONER

vs.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 6, 1961

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Appeals of the Commonwealth of Virginia.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 783 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

March 6, 1961

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Office-Supreme Court, U.S.
FILED
AUG 8 1961
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 63

MORGAN C. CHEWNING,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS
OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 63

MORGAN C. CHEWNING,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of Appeals of Virginia refused a writ of error by memorandum order without a written opinion (R. 29). The opinion of the Law and Equity Court of the city of Richmond (R. 9-12) is unreported.

Jurisdiction

The order of the Supreme Court of Appeals of Virginia refusing a writ of error was entered on June 14, 1960 (R. 29). The petition for a writ of certiorari was filed in this Court on August 1, 1960, and was granted on March 6, 1961 (R. 31). The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

Questions Presented

1. Was petitioner, an indigent prisoner with no counsel, deprived of his liberty without due process of law when, after denial of his request for counsel, he was tried as a recidivist by a state court and sentenced to ten years in the penitentiary?

2. Was petitioner, an indigent prisoner, denied the equal protection of the laws when the court denied him counsel at his recidivist trial, since Virginia law allows counsel at recidivist trials for defendants with money?

Constitutional Provisions and Statutes Involved

The following provisions of the Fourteenth Amendment to the United States Constitution are involved: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code, 1950, § 53-296 provides:

> When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United

States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury of bystanders shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, the court may sentence him to further confinement in the penitentiary for a period of not exceeding five years, if he has been once before sentenced in the United States to confinement in the penitentiary; but if he has been twice sentenced in the United States to such confinement, he may be sentenced to be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny.

Virginia Code, 1950, § 19.1-241 provides:

> In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him.

Statement

This is a habeas corpus proceeding commenced in 1959 in the Law and Equity Court of the city of Richmond, Virginia, by petitioner Chewning, a prisoner in the Virginia State Penitentiary. Chewning sought release from confinement on the ground that the ten-year sentence he is serving, imposed under the state recidivist statute (Va. Code, 1950, § 53-296), is void under Virginia law and under the Fourteenth Amendment to the Federal Constitution because of a denial of counsel in the recidivist trial.[1] The Law and Equity Court denied relief without a hearing (R. 13), and the Supreme Court of Appeals refused a timely petition for writ of error (R. 29). No response to the petition was called for, and no appearance was made on behalf of the respondent or the Commonwealth of Virginia at any stage of the proceedings below. Accordingly, petitioner's undenied allegations (R. 1-4) together with the exhibits to his petition (R. 5-7) furnish the facts of the case and must be taken as true.[2]

On June 25, 1958, the petitioner, then imprisoned in the Virginia Penitentiary, was brought before the Circuit Court

---

[1] Habeas corpus is an appropriate Virginia procedure for collaterally attacking a sentence on the ground of denial of the constitutional right to counsel. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953).

[2] *Cash* v. *Culver*, 358 U.S. 633, 634. The Supreme Court of Appeals of Virginia also takes this view. *Morris* v. *Smyth*, No. 5254, Sup. Ct. of Appeals, June 12, 1961.

of the city of Richmond where he was charged by information with having been three times convicted and sentenced to confinement in the penitentiary for a felony (R. 1-2, 5-6). This information and the ensuing trial were based on § 53-296 of the Virginia Code, the so-called recidivist statute. In substance it empowers the court, upon proof by records of three prior penitentiary sentences and of the identity of the defendant with the person named in the records, to sentence the defendant "for such additional time" as the court "may deem proper," presumably up to life imprisonment.

Petitioner alleges that the court proceeded to try, convict and sentence him to ten years imprisonment "without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958" (R. 2).

The trial court order of June 25, 1958, states in part: "The attorney for the Commonwealth filed information . . . the information being read to each of the accused, and each being first cautioned as to his rights, and each acknowledged in open court that he is the person mentioned in the several records of conviction" (R. 7). The court thereupon sentenced petitioner to "undergo a further confinement in the penitentiary for a term of ten years, said term to begin at the end of the present term . . ." (R. 7). This is the sentence under which Chewning is now being held by respondent (R. 1-2).

The entire proceedings from initial notification of the recidivist charge through the sentencing took place in one day—June 25, 1958—while petitioner was not represented by counsel (R. 1-2, 5-7).

Apparently no appeal was taken from the recidivist sentence. But in September, 1959, Chewning, still without

a lawyer, filed this habeas corpus petition in the Richmond Law and Equity Court (R. 1).[3] After appointing counsel (R. 8) and considering the authorities presented by him on behalf of petitioner (but without a response and without hearing evidence) the court denied the petition, stating that "the failure to furnish counsel to Mr. Chewning at his request does not invalidate the sentence given him under Virginia Code Section 53-296" (R. 9).

The trial judge's views on the federal claim are revealed in the following excerpts from his opinion:

> As to the mandate of the Fourteenth Amendment to the Constitution of the United States, here relied upon, the converse has been adjudicated. In *Gryger* v. *Burke*, 334 U.S. 728, where release on habeas corpus was sought on the ground that petitioner was without counsel at his recidivist hearing, Mr. Justice Jackson said, in part, as follows (at p. 731): " . . . the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid."
>
> This holding was adhered to in *Chandler* v. *Fretag*, 348 U.S. 3 . . . (R. 9).

After further discussion of various authorities the court concluded:

> It thus appears that there is no requirement under the State or Federal Constitution, nor is there any Virginia statute, requiring that the Circuit Court of the city of

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[3] The Law and Equity Court has jurisdiction to grant a writ of habeas corpus where, as here, petitioner is detained within the City of Richmond. Va. Code, 1950, § 8-596 (Supp. 1960); Va. Code, 1950, §§ 17-147, 17-164. Had the writ been granted (which it was not) it would have been made returnable to the Circuit Court of the City of Richmond where the recidivist sentence was imposed. Va. Code, 1950, § 8-598 (Supp. 1960).

Richmond assign counsel to persons brought before it under Code Section 53-296 (R. 12).[4]

Petitioner then sought review by appropriate petition for writ of error in the Virginia Supreme Court of Appeals, again without an attorney (R. 15-19). In his petition he recited the filing of his application for habeas corpus "wherein the petitioner complained that he was being illegally and unjustly held in confinement by the respondent due to the violation of his Constitutional Right to the assistance of counsel when proceeded against as a third offender under Section 53-296. . . ." (R. 19). And he alleged that the trial court erred in denying his habeas corpus petition without a hearing and that "the court erred in holding that failure to furnish counsel to the petitioner at his request does not invalidate the sentence given him under Virginia Code Section 53-296" (R. 20). Still further he asserted that "This case is governed by the rights of an accused, or defendant, under Section Eight of the Virginia Constitution, and the 14th Article of Amendment of the Constitution of the United States" (R. 21).

The Supreme Court of Appeals thereafter entered an order stating that the petition "having been maturely considered and a transcript of the record . . . seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the Law and Equity Court" (R. 29).

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[4] The trial judge held that the Code of Virginia, § 19.1-241, which requires appointment of counsel in "any case in which a person is charged with a felony" does not apply to a recidivist trial (R. 11). Section 18.1-6 of the Virginia Code provides in part: "Such offenses as are punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors."

This Court then granted a petition for writ of certiorari *in forma pauperis* to review the Virginia judgment (R. 31) and appointed counsel to represent the petitioner. 365 U.S. 875.

Summary of Argument

I

Petitioner's trial under the Virginia recidivist statute, § 53-296, was an independent criminal proceeding instituted by information on behalf of the Commonwealth. The Virginia courts view the recidivist proceeding as a criminal case wholly separate from any other judicial proceeding. Its most unusual feature is the discretionary sentencing power vested in the trial judge. For three or more previous convictions he may impose no punishment or he may impose any term of years up to life imprisonment.

Since petitioner's recidivist trial was a criminal case he was entitled to all of the Fourteenth Amendment protections, including the right to counsel, which surround any state criminal defendant. This court has recognized in *Chandler* v. *Fretag*, 348 U.S. 3, and *Reynolds* v. *Cochran*, 365 U.S. 525, that defendants in state habitual criminal cases have the same constitutional right to counsel as defendants in other state prosecutions.

II

Petitioner, without counsel, was tried as a recidivist and sentenced to ten years in the penitentiary. Considering the nature of the Virginia recidivist trial and the number and complexity of issues involved, the court's refusal of petitioner's request for the assistance of counsel operated to deprive him of his liberty with due process of law.

The trial judge's unusually broad discretion in determining a recidivist sentence made the presence of counsel

for petitioner essential to a fair hearing. In changing the sentence from mandatory life imprisonment to "such additional time as the court trying the case may deem proper" the legislature intended for the sentencing to be tailored to individual cases. In view of this and of the need for considering rehabilitation of the defendant, as well as other interests of society, it is important that the judge have before him all relevant information concerning the defendant. It is also vital that a full presentation of such information be made if the defendant is to have a fair hearing on the sentence. Since petitioner was already in the penitentiary he could not possibly assemble such evidence and pr pare his case. The assistance of counsel was essential for his. Moreover, the talents of trained legal counsel were ecessary for the adequate presentation in court of petitio. r's case.

At the trial the state must establish the existence and validity of records of prior convictions within the terms of the statute. The identity of the accused with the person named in the records must also be proved. These matters involve a variety of legal and factual questions to be tried to the court and a jury. The questions are such that only an attorney could recognize them and adequately deal with them. The absence of a lawyer left petitioner to face the prosecutor alone and deprived him of a fair hearing.

In a multitude of decisions the court has recognized the fundamental nature of the right to counsel. There can be no fair hearing for a defendant without counsel, even for a brief interval, as in *Ferguson* v. *Georgia,* 365 U.S. 570. The Court's opinions, particularly those of the last three terms, clearly indicate that sentencing the indigent petitioner to the penitentiary without counsel, despite his request for counsel, violated due process. The only possible argument to the contrary would rest on the outmoded dis-

tinction between capital and noncapital cases stemming from *Betts* v. *Brady*, 316 U.S. 455. That distinction was an anomaly in constitutional law. It was never endorsed by the whole court, and it has now been undermined by recent right-to-counsel decisions. Whatever validity that rule once had, it no longer comports with reason and justice. If it is fundamentally unfair to try a man without counsel when he faces a death sentence, it is no less fundamentally unfair to try him without counsel when he faces life imprisonment. The Fourteenth Amendment protects life and liberty equally. Recent opinions indicate that the court now takes this view.

III

The denial of counsel to the indigent petitioner at his recidivist trial denied him the equal protection of the laws since the law allows counsel to a recidivist defendant with money to obtain counsel. *Griffin* v. *Illinois*, 351 U.S. 12, stands for the proposition that the kind of trial a man gets cannot hinge on his financial means. The pocketbook is an irrational basis for the administration of the criminal law. A trial with counsel is clearly of higher quality than a trial without counsel. A defendant with money would have been allowed counsel; petitioner without money was denied counsel. The only difference is the pocketbook, an impermissible basis for difference in treatment under the Equal Protection Clause.

ARGUMENT

Chewning is before the Court on a state judgment denying his habeas corpus petition without response from the state and without a hearing. The basic question therefore is whether the judgment should be reversed and the case remanded to give petitioner an opportunity to establish at a hearing the claimed violation of his federal constitu-

tional right to counsel. The answer depends upon whether the petitioner's allegations and exhibits, taken as true for this purpose, show prima facie a violation of this constitutional right. *Reynolds* v. *Cochran*, 365 U.S. 525; *Williams* v. *Kaiser*, 323 U.S. 471.

Petitioner contends that the facts thus appearing are sufficient under the Fourteenth Amendment to call for a hearing in the trial court. Both the Due Process and Equal Protection Clauses, either separately or jointly, render void the ten-year sentence imposed on petitioner under the Virginia recidivist law if petitioner establishes at a hearing what he now alleges, that he was without counsel at his trial and that the court, despite his request, refused to appoint counsel to assist him.

I

The Virginia Recidivist Trial Was a Criminal Proceeding in Which the Petitioner Was Protected by the Fourteenth Amendment Right to Counsel.

A. Petitioner's Recidivist Trial Was an Independent Criminal Proceeding Which Subjected Petitioner to Imprisonment in the Penitentiary, at the Judge's Discretion, for a Term of Years or for Life.

Since the earliest days of statehood Virginia has had some form of recidivist or habitual criminal law. The present statute, Virginia Code, 1950, § 53-296, under which petitioner was tried and sentenced, has evolved from the earlier law. An understanding of its salient features is important in this case.

For many years statutes provided that the court should impose additional punishment when a person was convicted of an offense and sentenced to the penitentiary and it was alleged and proven at that trial that he had been

previously so sentenced. For one previous sentence the court was to give an additional five-year term; if the defendant had been twice previously sentenced to the penitentiary life imprisonment was required.[5] In the Code of 1887 those provisions were brought forward, but an additional provision was introduced authorizing a separate proceeding in the Circuit Court of the city of Richmond against any prisoner in the penitentiary who had not already been given the required additional punishment. Virginia Code, 1887, §§ 4180-83, 3905-06. In the event of such a proceeding, the same automatic five-year and life sentences applied. Thus recidivist sentences were fixed by law, and they could be imposed either at the trial of some offense or in a separate proceeding.

The law remained in that form until two major changes were made some twenty years later. In 1916, the Assembly changed the sentence in case of one previous conviction from a rigid five years to "such time not exceeding five years as the court trying the case shall, in its discretion, deem proper. . . ." And for two or more previous convictions the automatic life sentence was modified to "such time as the court trying the case, shall, in its discretion, deem proper . . ."[6] Life imprisonment was not prohibited; its mandatory feature was simply removed. The Code of 1919, § 5054, incorporated those changes and introduced another of significance. It made the recidivist proceeding a separate trial in the Circuit Court of the city of Richmond in all cases; it could no longer be combined with the trial of another offense. A revisors' note in the 1919 Code explains:

> . . . The revised section makes one material change in the law. Under it the subject of prior conviction can-

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[5] See, e.g., Va. Code, 1849, tit. 54, ch. 199, §§ 25, 26, p. 752.

[6] Acts of 1916, ch. 29, 30, pp. 34-35.

not be made a matter of inquiry on the trial of the principal offense. ALL proceedings are to be had in the Circuit Court of the city of Richmond. It seemed to the revisors unfair to the prisoner, when on trial for a felony, to prejudice his case by alleging and proving on that trial a former conviction at another time and place. The revised section gives the convict an opportunity to deny the existence of the records upon which he is charged.'

This appears in the present Code of Virginia without material alteration as § 53-296, the provision under which petitioner was tried and sentenced to ten years confinement.[8]

A proceeding under § 53-296 is a criminal trial in any sense of the term. By filing an information the Commonwealth of Virginia moves against a person to have him imprisoned in the state penitentiary for a long number of

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[7] "No discretion in fixing the additional time was given [in the 1887 Code]. To mitigate these harsh provisions, the General Assembly in 1916 amended the two sections so as to give the court much discretion in fixing the additional punishment. The revision retains the humane provisions of the amendments of 1916, but goes further and does not permit the subject of prior conviction to be made a matter of inquiry on the trial of the principal offense. All proceedings are to be had in the Circuit Court of the city of Richmond after the convict has been received in the penitentiary." Burks, The Code of 1919, 5 Va. Law Reg. N.S. 97, 106 (1919). See also *McCallister* v. *Commonwealth*, 157 Va. 844, 161 S.E. 67 (1931).

[8] In the United States today 46 states have habitual criminal or recidivist laws. The provisions vary widely on procedure, number and kind of prior offenses, length of sentence, and mandatory and discretionary features of sentencing. See Appendix, *infra* p. 47. The terms habitual criminal and recidivist appear to be synonymous in this country. See Brown, *The Treatment of the Recidivist in the United States*, 23 Can. B. Rev. 640 (1945); Tappan, *Habitual Offender Laws in the United States*, Fed. Prob., Vol. 13, No. 1, p. 28 (1949); Illinois Legislative Council, Habitual Criminal Statutes, Pub. 122 (1955).

years and possibly for life. The nature of the case is indicated by § 53-295, immediately preceding the recidivist statute, which says that "all criminal proceedings against convicts in the penitentiary shall be in the Circuit Court of the city of Richmond." The Virginia Supreme Court of Appeals has spoken of the statute as "highly penal" and of a person's being "prosecuted" under it and his being "tried and convicted as a recidivist." *Wesley* v. *Commonwealth*, 190 Va. 268, 271, 275, 56 S.E. 2d 362, 363, 365 (1949); see also *Wright* v. *Commonwealth*, 109 Va. 847, 65 S.E. 19 (1909). In short, one against whom an information is brought under § 53-296 stands in all respects in the same position as one prosecuted on any criminal charge carrying maximum punishment of life in the penitentiary.

The judge of the Law and Equity Court in this very case recognized this when he characterized the case as "criminal" and said that

> . . . the defendant in such a proceeding has the same rights to a speedy trial, to time for preparation, to insistance [sic] of counsel of his own choice, to compulsory process for witnesses, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to most other rights enjoyed by a defendant on trial for a criminal offense (R. 10).[*]

The trial judge nevertheless thought that the information filed against petitioner "did not charge the commission of a new separate offense" (R. 10). But this view of § 53-296 in the Virginia courts is of no importance as far as the federal constitutional right to counsel is concerned. Whatever the label, this was clearly a criminal proceeding the

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[*] See *State* v. *Janiec*, 9 N.J. Super. 29, 33, 74 A.2d 605, 607 (1950), *aff'd*, 6 N.J. 608, 80 A.2d 94, *cert. denied*, 341 U.S. 955 (1951).

object of which was to imprison the petitioner in the penitentiary.[10]

The most striking difference between the recidivist trial and other criminal cases is the unusual power lodged in the trial judge in fixing a recidivist sentence. If, as in Chewning's case, three convictions are alleged and established to the court's satisfaction, the judge apparently has discretion either to impose no additional confinement, to fix a term of years, or to sentence the defendant for life. There is no minimum and no maximum time prescribed. This feature makes a trial under § 53-296 potentially harsher than the usual prosecution. Clearly the defendant's liberty rests to a much greater extent in the hands of a single judge.

B. Petitioner as a Defendant in a Recidivist Case Had the Same Right to Counsel Under the Fourteenth Amendment as a Defendant in Any Other State Criminal Trial Which Could Result in a Penitentiary Sentence.

Since a proceeding to impose a penitentiary sentence on a person under § 53-296 has all the characteristics of the usual state criminal trial, it follows that petitioner should have had all of the Fourteenth Amendment protections, including counsel, which surround any criminal defendant. That the right to counsel covers a recidivist defendant has been made clear by several decisions of this Court. *Reynolds* v. *Cochran*, 365 U.S. 525; *Chandler* v. *Fretag*, 348 U.S. 3; *Gryger* v. *Burke*, 334 U.S. 728. In none of those cases

[10] The hybrid nature of another habitual criminal law is discussed in Note, New Jersey's Habitual Criminal Act, 11 Rutgers L. Rev. 654, 664-66 (1957). And for suggestion of a similar ambiguity in the Florida law, see *Reynolds* v. *Cochran*, 365 U.S. 525, 526 n. 2. Eighteen states appear to authorize a separate proceeding for the habitual criminal charge; in the other states the charge must be brought in connection with the trial of one of the underlying offenses. See Appendix, *infra*, p. 47.

was there any hint of any distinction between a recidivist or habitual criminal proceeding and any other state criminal proceeding as far as the constitutional right to counsel was concerned.[11] Indeed in *Chandler* v. *Fretag* the Court expressly relied on the landmark counsel decision, *Powell* v. *Alabama*, 287 U.S. 45, and on other felony cases involving the right to counsel (348 U.S. at 9-10). The point is too clear for further elaboration.

II

The Court's Refusal of Petitioner's Request for the Assistance of Counsel, in the Circumstances of His Recidivist Trial, Deprived Him of a Fair Hearing in Violation of the Due Process Clause of the Fourteenth Amendment.

A. The Broad Discretion Vested in the Trial Judge in Fixing Sentence—From No Confinement to Life Imprisonment—Necessitated the Presence of Counsel to Protect Petitioner and Insure the Presentation of All Information Relevant to the Sentencing Decision.

The aspect of petitioner's recidivist trial which overwhelmingly demonstrates the need for counsel is the sentencing procedure. Since the Virginia law now gives the trial judge discretion in fixing the length of sentence, it was critically important to the petitioner (and to society) that the fullest possible amount of relevant information be put before the court so that it would have an adequate basis for a rational decision.

Petitioner was sentenced to confinement for ten years in addition to all other sentences. How did the judge arrive at that figure? What information was furnished him and by whom? Here is the heart of the whole matter. For

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[11] See also *Johnson* v. *Kansas*, 284 F.2d 344, 345 (10th Cir. 1960); *State* v. *Janiec*, *supra* n. 9.

clearly § 53-296, as well as justice and modern penology, contemplates that sentencing should not be mechanical.[12] The history of the statute explicitly reveals a legislative judgment that the sentencing of recidivists should be flexible and tailored to fit individual cases.[13]

Thus it would appear that a considerable range of data about the prisoner should be developed: his total record, both in and out of prison; the number and character of all former offenses; the circumstances surrounding the commission of the former offenses; prior gainful employment; the defendant's character, with all that the term implies

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[12] See Frym, The Treatment of Recidivists, 47 J. Crim. L., C. & P.S. 1 (1956): ". . . once we begin to question the wisdom of incarceration and realize its destructive effect in most criminal cases, we need no longer adhere to the artificial classification of offenders in crude categories. We can afford to individually study human beings who have failed and to organize their rehabilitation accordingly. This also is true of any kind of therapeutical approach to recidivists. Only a thorough sociological and clinical study of the individual repeater can guide us in our selection of rehabilitative measures. . . .

"Rehabilitation . . . requires not only thorough understanding of the offender's total personality, body and mind, but also of the environmental forces which have left their imprint and generated extreme tensions since his early childhood. His inability to handle these tensions in a socially acceptable manner has brought him into conflict with the law." See Morris, The Habitual Criminal 8-23 (1951).

[13] See notes 6, 7, *supra*. Whether the statute is administered in accord with the legislative intent is not clear. For examples of lengths of sentences see the following cases in which recidivist sentences were under attack: *Sims* v. *Smyth*, 282 F.2d 814 (4th Cir. 1960) (10 years); *Holly* v. *Smyth*, 280 F.2d 536 (4th Cir. 1960) (10 years, 15 years; total 25); *Morrison* v. *Smyth*, 273 F.2d 544 (4th Cir. 1960) (15 years); *Harvey* v. *Smyth*, 255 F.2d 21 (4th Cir. 1958) (40 years); *Walker* v. *Smith*, 195 Va. 228, 77 S.E.2d 855 (1953) (10 years); *Royster* v. *Smith*, 195 Va. 228, 77 S.E.2d 855 (1953) (10 years); *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953) (10 years); *Willoughby* v. *Smyth*, 194 Va. 267, 72 S.E.2d 636 (1952) (10 years); *Robinson* v. *Smyth*, 190 Va. 724, 58 S.E.2d 4 (1950) (10 years); *Wesley* v. *Commonwealth*, 190 Va. 268, 56 S.E.2d 362 (1949) (10 years).

evidentially. Obviously an adequate presentation of such data calls for preparation and out-of-court investigation—a task that cannot be undertaken by an indigent person locked in the penitentiary. Here the assistance of counsel is essential; it is not a mere luxury. Without counsel there is no assurance that the court will have a complete factual picture. There is accordingly no assurance that a fair sentence will be fairly imposed. It is constitutionally immaterial that petitioner cannot now prove that his sentence would have been different had he had counsel. *Townsend* v. *Burke*, 334 U.S. 736, 741.

This Court has shown its awareness of the need for counsel at the sentencing stage in a case where the judge had a broad discretion. After indicating that a court could find that the defendant who pleaded guilty had, in the particular circumstances, knowingly waived counsel, the Court said:

> But the imposition of sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. *Carter* v. *Illinois*, 329 U.S. 173, 178.

The trial judge himself is hardly in a position to undertake the kind of investigation necessary.[14] However, the

[14] Cf. *Powell* v. *Alabama*, 287 U.S. 45, 61: "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it

Circuit Court of the city of Richmond probably has authority to call on a probation or parole officer for help in a recidivist case, since § 53-250 of the Virginia Code directs such an officer to "Investigate and report on any case pending in any court . . . in his jurisdiction referred to him by the court . . ." This investigation and report is made mandatory on defendant's motion in any "felony charge" where a sentence of more than ten years may be imposed.[15] The Virginia Supreme Court of Appeals has never ruled on whether this right is available to a recidivist defendant like petitioner. Clearly it may be of great value since a recidivist defendant is already in prison and cannot personally assemble evidence. Here is an important legal point which only a lawyer can identify and raise. Even if the statute is held not to require a report, the judge might order it as a matter of discretion if asked to do so. But a layman would hardly be aware of this possibility.

The Virginia court has held that where a probation officer's report was given the court, even though not commanded by the statute, the accused must be allowed to

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that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

[15] ". . . the court may, or on the motion of the defendant shall, before fixing punishment or imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer shall present his report in open court in the presence of the accused who shall be advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present." Va. Code, 1950, § 53-278.1.

cross-examine the officer. The court said that the receipt of evidence bearing on the quantum of punishment was "an important part of the trial at which she was entitled to the aid of her counsel." *Linton* v. *Commonwealth*, 192 Va. 437, 441, 65 S.E. 2d 534, 536 (1951).

If the trial judge on his own motion does not call for an investigation and report by a probation officer and if the defendant has no lawyer, the trial judge must of necessity depend chiefly upon the prosecutor. Surely whatever ex parte presentation the prosecution may make cannot be relied upon to reveal fully all information favorable to the accused, nor can it guarantee the kind of fair hearing which due process requires.[16] The whole history of the Anglo-American adversary system teaches this lesson.

In addition to petitioner's right to a fair hearing, there is an important social interest in the administration of a recidivist law in keeping with its purpose and with humane standards of modern penology.[17] This legitimate interest can only be safeguarded if there is present at the recidivist trial counsel for the prisoner as well as counsel for the state. Counsel for a recidivist defendant thus serves something of a dual purpose—he insures a fair trial for the individual defendant, and his presence in that role is some guarantee to society that the recidivist law is properly administered.

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[16] See Hobbs, Prosecutor's Bias, An Occupational Disease, 2 Ala. L. Rev. 40 (1949).

[17] Cf. Mewett, Habitual Criminal Legislation Under the Criminal Code, 39 Can. B. Rev. 43, 56 (1961): "... if you have habitual criminal legislation, you must be prepared to spend a great deal of money and devote a great deal of time in the proper functioning of preventive detention, because preventive detention without money and without time and trouble is savage and degrading to the society which imposes it."

Nothing in § 53-296, its history, or in the judicial decisions dealing with it reveals its precise purpose. But it would appear to have generally the same purpose as other recidivist and habitual criminal laws in the United States. These laws all provide for the imprisonment of a multiple offender for a term in addition to the sentences he serves for the offenses. They have been said to be based on the theory that such persons constitute a special menace to society and that the additional sentence is imposed in the threefold hope of (1) deterring others from joining their ranks, (2) placing as many hardened criminals as possible in long-term confinement where they can do no further harm, and (3) rehabilitating all who are amenable to society's discipline.[18]

The mandatory life sentence which still exists in some 19 states[19] seems to exclude any consideration of rehabilitation and to be based entirely on the theory of deterrence and protection of society. Such a provision embodies a legislative decision that all multiple offenders are beyond reform. Since Virginia took the enlightened step of abolishing mandatory life imprisonment for recidivists it would seem that rehabilitation is to be considered at least as much as other objectives. Certainly the modern trend in the use

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[18] Illinois Legislative Council, Habitual Criminal Statutes, Pub. 122, p. 1 (1955). It has been pointed out that these American laws are unlike the preventive detention acts in Europe and that the American laws do not seem to be concerned with the special type of treatment which the European laws afford; in the United States the habitual criminal is treated like any type of offender "with the possible exception that he usually receives a more severe penalty and is usually sentenced to maximum custody institutions. . . ." Brown, *The Treatment of the Recidivist in the United States*, 23 Can. B. Rev. 640, 645-46 (1945).

[19] Model Penal Code, Explanatory Notes § 7.03, at 39-40 (Tent. Draft No. 2, 1954). The extreme harshness of such mandatory punishment is obvious.

of flexible, moderate sentences is in that direction.[20] And it can be assumed that Virginia at least attempts to administer its criminal law and penal system under sound, modern principles. If this be so, then the need for counsel to represent a recidivist defendant is accentuated. For, in deciding on a sentence that appropriately takes into account rehabilitation of the individual prisoner as well as society's interest in protecting itself and deterring others from crime, a judge is confronted with a complex problem. He needs all the help he can get, and the defendant needs the assistance of counsel to marshal and present the facts. "The term habitual criminal, like the term insane person or criminal sexual psychopath, connotes a combination of legal, sociological and psychological concepts." [21]

Petitioner, already incarcerated in the penitentiary, alone and unaided, was thus faced with matters far beyond his ability to meet. The professional assistance of a lawyer was essential for a fair hearing, and a fair hearing is commanded by due process when the state moves to deprive a man of his liberty for ten years or life.

B. Trial Under the Recidivist Statute Involved Numerous Difficult Legal and Factual Questions Which Made the Assistance of Counsel Essential to a Fair Hearing.

Apart from the judge's unlimited discretion in sentencing, the nature of the proceeding brought against peti-

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[20] See Model Penal Code § 7.03 (Tent. Draft No. 2, 1954) where the American Law Institute takes the position that length of the sentence, if any, is for the judge to fix in each case. The Canadian statute requires a finding that defendant is "persistently leading a criminal life," and the mere fact of three previous convictions will not alone support such a finding; even after the finding is made the sentence is discretionary. Mewett, Habitual Criminal Legislation Under the Criminal Code, 39 Can. B. Rev. 43, 47, 50 (1961).

[21] *Id.* at 49. See generally the excellent study by Norval Morris, The Habitual Criminal (1951). See also Waite, the Prevention of Repeated Crime (1943); 13 Encyc. Soc. Sci. 157-60.

tioner, who was without counsel of his own, was such that the refusal to provide counsel at his request, coupled with the notifying, trying and sentencing of him all in one day, deprived petitioner of his liberty without due process of law.[22]

Examination of § 53-296 and related case law reveals numerous difficult legal and factual questions which a layman would not only be incapable of meeting but would not even identify as questions. As this Court once said, "The nature of the charge emphasizes the need for counsel." *Tomkins* v. *Missouri*, 323 U.S. 485, 488.

To make out a case the state must prove the existence of records of prior convictions and the identity of the prisoner with the person named in each. These matters may be disputed by defendant in a variety of ways. The court decides all questions concerning the records, and a jury tries the issue of identity. While on the surface these issues may not seem complex, a closer look indicates otherwise.

Consider first the existence of records of former convictions. Not only must the records be properly authenticated, but the former convictions must also be valid. The

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[22] Since petitioner rests his case here on denial of counsel he is not arguing that the lack of advance notice of the recidivist trial constituted in itself a violation of due process, although this point has merit. The Tennessee habitual criminal law was twice held unconstitutional because notice failed to meet due process requirements. *Application of Boyd*, 189 F.Supp. 113 (M.D. Tenn. 1959), *aff'd mem. sub nom. Bomar v. Boyd*, 281 F.2d 195 (6th Cir. 1960); *Rhea* v. *Edwards*, 136 F.Supp. 671 (M.D. Tenn. 1955), *aff'd mem.* 238 F.2d 850 (6th Cir. 1956). See *United States ex rel. Collins* v. *Claudy*, 204 F.2d 624 (3d Cir. 1953). The issue of pretrial notice has been argued before this Court in two habitual criminal cases, but on both occasions the Court found the question unnecessary for decision since the right to counsel was held to have been violated. *Reynolds* v. *Cochran*, 365 U.S. 525, 530 n. 8; *Chandler* v. *Fretag*, 348 U.S. 3, 5-6 n. 4. Petitioner does assert, however, that the lack of pretrial notice accentuated his need for the assistance of counsel at the trial.

Virginia court has held that a recidivist sentence cannot be based on a prior conviction which is void; and the validity of any alleged convictions which the state relies on can be inquired into and litigated in the recidivist trial. *Wesley* v. *Commonwealth*, 190 Va. 268, 56 S.E. 2d 362 (1949); see *Royster* v. *Smith*, 195 Va. 228, 77 S.E. 2d 855 (1953). For a former conviction to be a valid basis for a recidivist sentence it must have been adjudged by a court with jurisdiction over the offense and over the person of the defendant; it must have been for an offense punishable by a penitentiary sentence, and defendant must have been actually sentenced to confinement in the penitentiary. Furthermore, violations of Fourteenth Amendment rights in the former trial, such as denial of counsel, will render the conviction invalid and hence no basis for a recidivist sentence. See generally, *Wesley* v. *Commonwealth, supra; Royster* v. *Smith, supra; Willoughby* v. *Smyth*, 194 Va. 267, 72 S.E. 2d 636 (1952). In short, it appears that any ground for collateral attack on the convictions may be raised and litigated. See *Reynolds* v. *Cochran*, 365 U.S. 525, 531 n. 13. All these are problems no uncounselled layman can identify or meet.[23]

Moreover, it is not clear what effect a pardon has on the use of a former sentence in a recidivist trial. The Virginia courts do not appear to have passed on this question. Courts in states where the problem has arisen under habitual criminal laws have taken different positions. Some say the pardon has no effect, and some say that it wipes out

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[23] The record indicates that petitioner was charged with convictions for offenses under Virginia law (R. 5). But § 53-296 subjects to a recidivist sentence any prisoner who has previously "been sentenced to a like punishment in the United States." Thus a conviction from any of the 50 states and the federal courts could be used against a defendant. Questions concerning out-of-state records would obviously present even greater difficulties for a layman in jail.

the conviction. See 25 Am. Jur. Habitual Criminals, § 21, pp. 269-70.

By judicial gloss it appears that if a prior conviction is under appeal it cannot form the basis for a recidivist charge. *White* v. *Commonwealth*, 79 Va. 611 (1884). Moreover, there is doubt whether two prior convictions occurring on the same day or at the same term of court could both be used in a recidivist case. See *Commonwealth* v. *Welsh*, 4 Va. (2 Va. Cases) 57 (1817); *Dye* v. *Skeen*, 135 W. Va. 90, 62 S.E. 2d 681 (1950). These points could be of great importance to petitioner, but without imaginative legal research by a lawyer they would almost surely pass unnoticed. Even an intelligent defendant who carefully read § 53-296 would not be made aware of such subtleties of judicial interpretation.

More fundamentally, the recidivist statute may be vulnerable to constitutional attack on *ex post facto* or double jeopardy grounds. With reference to a similar Florida law, the Court said such questions "certainly cannot fairly be characterized as frivolous." *Reynolds* v. *Cochran*, 365 U.S. 525, 530. In practice there is some evidence that the same conviction may be used in two different recidivist trials. See *Holly* v. *Smyth*, 280 F. 2d 536, 538-39 (4th Cir. 1960), where it appears that a 1942 conviction for storebreaking was used in 1951 to impose a ten-year recidivist sentence on the defendant and was used again in 1957 as part of the basis for a fifteen-year sentence. This practice seems to raise a serious constitutional question necessitating counsel to protect the defendant's rights.

The prosecution must establish the identity of the defendant with the person named in the records. A jury is to be impaneled to try the issue of identity if it is disputed. How is the jury to be selected? On what grounds may such jurors be challenged? Apparently the Virginia court will not

allow peremptory challenges but will recognize challenges for cause. See *Brooks* v. *Commonwealth*, 41 Va. (2 Rob. 845) 882 (1843). How is a prisoner without legal training and experience to know what constitutes cause or how to develop the evidence to prove some ground of challenge? Since by the nature of a recidivist proceeding the defendant will already be in the penitentiary, he is unable personally to conduct any kind of preliminary investigation which would be essential to an informed decision on grounds for challenge.

After a jury is selected the issue of identity is then tried with the prosecuting attorney matched against an indigent convict. Actually the prisoner is confronted by the entire resources of the state. Realistically can it be said that in the marshaling and presentation of evidence this is an evenly matched contest? Even though the defendant may have the "right" to have witnesses summoned and may examine them, who is to do the preliminary investigation, the kind of pre-trial preparation that is indispensable to the adequate presentation of any matter? This Court has fully recognized that pre-trial services of counsel are as essential as counsel during trial. See *Powell* v. *Alabama*, 287 U.S. 45, 68-71; *Avery* v. *Alabama*, 308 U.S. 444, 446; *White* v. *Ragen*, 324 U.S. 760, 763-64; *Hawk* v. *Olson*, 326 U.S. 271, 278. To say that a lone defendant can adequately prepare his case and defend himself is to engage in fantasy.

Section 53-296 provides that for good cause a defendant may have a continuance. Even assuming that petitioner was aware of this, how was he, without the assistance of counsel, to have any idea whether a continuance would be of any benefit? And how is a prisoner himself to investigate and present grounds of good cause? "Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious crim-

inal charge after arraignment is too large to permit speculation on its effect." *Hawk* v. *Olson*, 326 U.S. 271, 278.

In light of this array of legal and factual issues in a recidivist trial it cannot realistically and rationally be said that petitioner had a fair trial without the assistance of counsel.[24] "Law addresses itself to actualities." [25]

It is of course no answer at all to say that this particular record does not show that petitioner attempted to raise any of the issues enumerated above. This is no answer for the very simple reason, already mentioned, that most of the issues could only be recognized as issues by a lawyer. An indigent prisoner is not apt to appreciate these nice legal questions. It would border on the absurd to assert that the failure of the unaided petitioner to raise any issues demonstrates that he had a fair trial. The failure to make an adequate defense or to raise any questions is one of the normal consequences of being unrepresented. Surely no system of rational justice can use the adverse consequences of the denial of counsel as a justification for the denial.

C. The Due Process Clause Required That Petitioner Be Represented by Counsel.

Considering the totality of the circumstances—the nature of a Virginia recidivist trial, the numerous factual and legal issues that may arise, the judge's discretion to imprison petitioner for life, the facts that petitioner was already in the penitentiary and could not help himself, that

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[24] In pointing to only one issue of construction under the Florida second-offender law, this Court said: "We of course express no opinion as to how this question of statutory construction should eventually be decided by the Florida courts. But its mere existence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value." *Reynolds* v. *Cochran*, 365 U.S. 525, 532-33.

[25] *Griffin* v. *Illinois*, 351 U.S. 12, 23 (concurring opinion).

he had no lawyer of his own, that he expressly requested the assistance of counsel, that all in one day he was notified, tried and sentenced to ten years—considering all these it is clear that the refusal of the court to appoint counsel deprived petitioner of a fair hearing and thus of his liberty without due process of law.[26]

Twice recently this Court has unanimously held that due process was violated by a state court's refusal to allow a defendant on an habitual charge an opportunity to obtain his own counsel. *Reynolds* v. *Cochran*, 365 U.S. 525; *Chandler* v. *Fretag*, 348 U.S. 3. In those cases the Court stressed the need for counsel by one proceeded against as a multiple offender. Everything said there applies to petitioner. Indeed petitioner's need was greater because of the discretionary sentencing power which the Virginia judge had and which the judges in *Reynolds* and *Chandler* did not have.

Also, last term in *McNeal* v. *Culver*, 365 U.S. 109, the Court held, again unanimously, that due process was violated when a twenty-year sentence was imposed in a trial without counsel for defendant. Noting that "the record at least implicitly discloses a number of highly complex legal questions, beyond the comprehension of almost any layman" (365 U.S. at 114), the Court examined generally the

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[26] Petitioner is not particularly concerned with whether this result is reached by an absorption into the Fourteenth Amendment of the Sixth Amendment guarantee of counsel or by a holding that here the right to counsel is one of those fundamental matters embraced by the Due Process Clause itself. Petitioner does assert, however, that this Court's statements about the fundamental nature of the right under the Sixth Amendment apply equally to the right under the Fourteenth Amendment. E.g., "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76; see *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63.

degrees of assault and the kind of intent necessary to guilt —matters not unlike issues in petitioner's recidivist trial.

In *Hudson* v. *North Carolina,* 363 U.S. 697, the petitioner was tried with two co-defendants, one of whom had a lawyer. That lawyer afforded representation to all accused until midway in the trial when he withdrew, leaving the petitioner without representation. Despite its acceptance of findings that petitioner was intelligent and familiar with court procedure, the Court held that due process was denied because of potential prejudice to petitioner from the co-defendant's plea of guilty at the time counsel withdrew. If such potential prejudice (which was not even suggested by petitioner's counsel) was sufficient to show a denial of due process to one who had counsel for half the proceedings, surely due process was denied Chewning who had no counsel at all, thereby suffering much greater potential prejudice.

In *Ferguson* v. *Georgia,* 365 U.S. 570, an even stronger precedent, the Due Process Clause was held to invalidate a state conviction where the defendant had his own lawyer throughout the trial; but his lawyer was not allowed to question him when he made an unsworn statement in accordance with state practice. The decision was rested on the ground that for this portion of the trial the defendant was left without the "guiding hand of counsel" (*Powell* v. *Alabama,* 287 U.S. 45, 69). Surely if it is unconstitutional to compel an accused with counsel to testify, if he cares to testify, without being interrogated by his counsel, *a fortiori* it was unconstitutional to compel Chewning to go to trial completely without any counsel at any stage. In *Ferguson* counsel for the accused was present at all times conducting the trial and could have prepared defendant carefully in advance as to every detail of the unsworn

statement—what to say or not to say, how to phrase the statement, etc. Yet the fundamental fairness of due process prohibited the state from withholding counsel even for one brief interval.

Of course *Ferguson*, as well as *Williams* v. *Kaiser*, *infra*, was a capital case, whereas Chewning faced life imprisonment. But as will be discussed later, this is no longer important in the constitutional right to counsel.

The question here is whether petitioner's habeas corpus petition shows a prima facie violation of the constitutional right to counsel so that he is entitled to a hearing. In this posture the case is parallel to *Williams* v. *Kaiser*, 323 U.S. 471:

	Williams v. Kaiser	Chewning v. Cunningham
State sentence	15 years	10 years
Imposed for	robbery	recidivism
Collateral attack by	state habeas corpus	state habeas corpus
Petitioner's allegations	"Prior to his conviction and sentence, as aforesaid, the petitioner requested the aid of counsel. At the time of his conviction and sentence, as aforesaid, the petitioner was without the aid of counsel, the Court did not make an appointment of counsel, nor did petitioner waive his constitutional right to the aid of counsel, and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty."	"That the Circuit Court . . . proceeded to try and convict, and sentence the petitioner to imprisonment . . . for the . . . period of ten years . . . without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958."
State Court's disposition of habeas corpus	denial without response and without a hearing	denial without response and without a hearing

The cases thus present no material differences.[27]

In *Williams* v. *Kaiser* the Court held that "the petition makes a *prima facie* showing of denial of the constitutional right." (323 U.S. at 474.) The opinion pointed to matters of state law which could be involved in a robbery case, such as degrees of the offense, the kind of evidence required for conviction, and various defenses available—questions quite similar to those which could arise in a Virginia recidivist trial, as discussed above. Chief reliance was placed on *Powell* v. *Alabama*, 287 U.S. 45, and from it the Court quoted language which has grown in persuasiveness with the passage of nearly thirty years. Its unimpeachable appeal to reason and to the fundamental sense of fairness which is central to due process makes it worth quoting again:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of

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[27] According to the trial court's order, Chewning acknowledged "that he is the person mentioned in the several records of conviction" (R. 7). Since there is no showing that Chewning raised questions concerning the records, this acknowledgment seems analogous to a plea of guilty without counsel, as in *Williams* v. *Kaiser*. This court has held several other times that a sentence based on a plea of guilty by an uncounseled accused worked a deprivation of liberty without due process. *E.g.*, *Uveges* v. *Pennsylvania*, 335 U.S. 437; *Townsend* v. *Burke*, 334 U.S. 736; *Rice* v. *Olson*, 324 U.S. 786; *Tomkins* v. *Missouri*, 323 U.S. 485.

> counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. *Powell* v. *Alabama*, 287 U.S. 45, 69.

That passage has been cited time and again by this Court. It commands that petitioner's trial without counsel be set aside. This Court must either repudiate that language and the whole spirit of the opinion or it must hold that petitioner is unconstitutionally imprisoned.

The only possible argument that can be made against granting petitioner relief is the now outmoded distinction between capital and noncapital state criminal cases. That distinction, applied to the right to counsel and to no other constitutional right, stems from *Betts* v. *Brady*, 316 U.S. 455. It never attracted more than a bare majority of the Court. It was under constant criticism from its inception, not only by a substantial minority of the Court[28] but also by legal writers.[29] In retrospect it seems clear that *Betts*

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[28] See, *e.g.*, *Betts* v. *Brady*, 316 U.S. 455, 474 (dissenting opinion); *Foster* v. *Illinois*, 332 U.S. 134, 139 (dissenting opinion); *Bute* v. *Illinois*, 333 U.S. 640, 677 (dissenting opinion); *Gibbs* v. *Burke*, 337 U.S. 773, 782 (concurring opinion); *McNeal* v. *Culver*, 365 U.S. 109, 117 (concurring opinion). See also *Uveges* v. *Pennsylvania*, 335 U.S. 437, 440-41; *Palmer* v. *Ashe*, 342 U.S. 134, 135n.

[29] Among the many law review comments on the problem see Green, The Bill of Rights, The Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 876-84 (1948); Fellman, The Federal Right to Counsel in State Courts, 31 Neb. L. Rev. 15 (1951); Racknow, The Right to Counsel—Time for Recognition Under the Due Process Clause, 10 W. Res. L. Rev. 216 (1959); Notes, 21 Chi.-Kent L. Rev. 107 (1942); 16 So. Calif. L. Rev. 55 (1942); 23 Tex. L. Rev. 66 (1944); 38 J. Crim. L. & C. 375 (1947); 1 Ala. L. Rev. 75 (1948); 37 Geo. L. J. 109 (1948); 1948 Wis. L. Rev. 235 (1948); 4 Ark. L. Rev. 177 (1950); 48 Mich. L. Rev. 521

v. *Brady* was an unwise dilution of the fundamental right to counsel.

The distinction was an anomaly in the law, for no other due process protection in state prosecutions depended on whether the accused could be sentenced to death or to life imprisonment. The Fourteenth Amendment proscribes the use of coerced confessions in capital and noncapital cases; likewise a state cannot constitutionally exclude members of defendant's race from the jury in any prosecution.[30] But strangely enough, the right to counsel, which is fundamental because upon it depends the assertion of all other rights, was singled out and thought not to extend to all state criminal defendants.

(1950); 26 Temple L. Q. 86 (1952). No legal commentary has been found favorable to the rule of *Betts* v. *Brady*. See also Letter from Benjamin V. Cohen and Erwin N. Griswold to the Editor of the N. Y. Times, N. Y. Times, Aug. 2, 1942, § 4, p. 6E, cols. 5, 6, 7: [after a critical analysis of *Betts* v. *Brady*] "Most American lawyers and laymen alike—before the decision in *Betts* v. *Brady*—would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our own Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in *Betts* v. *Brady* would not wish their decision to be used to discredit the significance of the right and the importance of its observance.

"Yet at a critical period in world history, *Betts* v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law."

[30] The Court's many opinions in confession and jury exclusion cases from state courts are devoid of suggestion that due process protections in those areas are any different in capital and noncapital prosecutions. The confession cases were most recently canvassed in *Reck* v. *Pate*, 81 Sup. Ct. 1541. Moreover, last term the Court chose a noncapital case as the occasion to extend to state defendants the constitutional protection against the admission of unconstitutionally seized evidence. *Mapp* v. *Ohio*, 81 Sup. Ct. 1684.

The rule which evolved from *Betts* v. *Brady* was that although in a state capital case the accused had an absolute right to counsel under the Fourteenth Amendment in a state noncapital prosecution this constitutional right existed only if there were "exceptional circumstances" showing that counsel was necessary to a fair hearing. See *Bute* v. *Illinois*, 333 U.S. 640, 676-77. This carried the extraordinary inference that under ordinary circumstances an accused not trained in the law was fully capable of defending himself in court against a professional prosecuting attorney. The rule was of course far out of contact with reality. Lawyers who can recall their first fumbling efforts as neophytes at the bar can testify to this. It is well-known that even a college education and a degree from an approved law school do not really equip a man to go immediately into a courtroom. Actual experience in litigation with guidance from a seasoned practitioner is still a necessary supplement to formal legal education. How then can it be expected that one without any legal education or training can adequately match himself against the lawyer for the state? "There is no war between the Constitution and common sense." [21] If the rule of *Betts* v. *Brady* were sound it would make an excellent argument for drastically lowering requirements for admission to the bar. Furthermore the state would not need a person trained in the law to handle the prosecution, much less a staff to back him up.

Another serious defect in the rule was that it placed upon one who had been tried and sentenced without a lawyer the burden of proving retrospectively that in some tangible, specific way he had been prejudiced.[22] There was a pre-

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[21] *Mapp* v. *Ohio*, 81 Sup. Ct. 1684, 1693.

[22] "Surely the majority [in *Betts* v. *Brady*], in adopting Bond's position that counsel could have done little or nothing for the defendant, was pursuing a line of reasoning which would in-

sumption, so to speak, of no prejudice from being tried without counsel. The realities of litigation, however, support just the opposite presumption—that in general a person is prejudiced and does not have assurance of a fair hearing without counsel. Moreover, a convicted state prisoner is not saddled with such a burden in claiming other Fourteenth Amendment rights. If a coerced confession is used against him, his conviction is void without more; he is not required to prove that it was not true or that it was necessary to support his conviction.[33] Likewise, if he establishes that members of his race were excluded from the jury on racial grounds he need go no further; the Court does not inquire whether this in fact worked to his detriment.[34] And so it should be with the right to counsel.

Many other sound arguments have been made against *Betts* v. *Brady*. As the Court is doubtless familiar with them all, they will not be repeated.[35] Happily this constitutional anomaly engrafted on the right has been on the demise for some time.

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evitably destroy all rights. Rights are agreed upon in order to insure that justice will be done prospectively, in the ordinary run of affairs. To hold that an individual can be deprived of rights except in those cases where a retrospective view of events reveals a shocking situation is to defeat the whole rationale of the rule of law." Beaney, The Right to Counsel in American Courts 163 (1955).

[33] See *Rochin* v. *California*, 342 U.S. 165, 173; *Blackburn* v. *Alabama*, 361 U.S. 199, 206.

[34] This inference is drawn from the Court's unconcern in its opinions with whether the defendant was actually prejudiced. See cases collected in *Eubanks* v. *Louisiana*, 356 U.S. 584, 585 n. 1.

[35] See notes 28, 29, *supra*. Cf. *Kinsella* v. *Singleton*, 361 U.S. 234, 244.

While the Court has not yet had an occasion expressly to publish the obituary,[35] it is clear from recent opinions that the old distinction is dead. It only remains for the Court to make the formal announcement that the Constitution requires that a person have the assistance of counsel whenever the state moves to imprison him in the penitentiary for any substantial length of time.

It is significant that in holding that civilian dependents of servicemen overseas have a constitutional right to jury trial in noncapital cases the Court squarely rejected the view that a noncapital charge might stand on a different constitutional footing than a capital charge. *Kinsella* v. *Singleton*, 361 U.S. 234, 246-247. After citing *Powell* v. *Alabama* and *Betts* v. *Brady*, which were used in support of the rejected view, the Court said:

> Obviously Fourteenth Amendment cases dealing with state action have no application here, but if they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here, an infamous case by constitutional standards, would be as invalid under those cases as it would be in cases of a capital nature (361 U.S. at 246-47).

Then just last term in *Ferguson* v. *Georgia*, 365 U.S. 570, when it held due process to be violated when an accused's own counsel was not allowed to question him during his unsworn statement, the Court stated:

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[35] Two members of the Court concurring in *McNeal* v. *Culver*, 365 U.S. 109, 117, thought that the appropriate moment was then at hand. An Appendix to their opinion (365 U.S. at 119) gives an up-to-date compilation of all state laws relating to the appointment of counsel. Even in the military system where courts-martial, unlike ordinary criminal trials, are viewed to a large extent as disciplinary measures, the right of the accused in a general court martial to have trained legal counsel is absolute. Arts. 27, 38(b), UCMJ, 64 Stat. 117, 120 (1950); *United States* v. *Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

> Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel (365 U.S. at 596).

Short of a square holding, this seems to be as clear a statement as could be made that the right to counsel does not depend on whether a capital sentence can be imposed.

Over the last three terms the Court has decided with full opinion five cases from state courts where petitioners claimed denials of the right to counsel.[37] Each of these was decided in favor of the petitioner. *Reynolds* v. *Cochran,* 365 U.S. 525; *McNeal* v. *Culver,* 365 U.S. 109; *Ferguson* v. *Georgia,* 365 U.S. 570; *Hudson* v. *North Carolina,* 363 U.S. 697; *Cash* v. *Culver,* 358 U.S. 633. All except *Ferguson* were noncapital cases. And all but *Hudson* were decided without a dissenting vote. In *Hudson* the two dissenters asserted that the majority opinion "without so much as mentioning *Betts* v. *Brady* . . . cuts serious inroads into that holding. . . ." (363 U.S. at 704.) Petitioner submits this is correct, with the qualification that *Betts* v. *Brady* had already been inroaded and undermined for some time. It was bound to be, for it could not withstand the force of reason. Whatever its validity may have been, it has been eroded by 19 years of experience and reflection.

These latest opinions show that the members of this Court are really no longer concerned with the capital-noncapital aberration which was never injected into any other constitutional right. If it is fundamentally unfair for

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[37] Another, *Bushnell* v. *Ellis,* 366 U.S. 418, was decided per curiam for petitioner. Three Justices dissented for reasons not touching the merits.

a man to be tried without counsel when he may be sentenced to death or a term of years it is no less fundamentally unfair to try petitioner without counsel when he may be sentenced to life imprisonment or a term of years. To draw any line here is to draw a line between life and liberty which is not in the Fourteenth Amendment. Life and liberty stand on equal footing. The state is forbidden to take either without due process.

Since the whole course of decisions in recent years points toward this, the Court should make the matter clear by an opinion to that effect. Cf. *Mapp* v. *Ohio*, 81 Sup. Ct. 1684. However, all that need be decided in this case is that a ten-year penitentiary sentence imposed in a Virginia recidivist trial upon petitioner without counsel (there being no waiver of the right to counsel) deprived petitioner of liberty without due process of law."

" *Gryger* v. *Burke*, 334 U.S. 728, does not stand in the way of sustaining petitioner's claim. That case was decided 13 years ago by a sharply divided court. Even within the five members of the majority there was not complete accord, as some preferred to affirm the judgment on the ground that the attack on the sentence was premature (334 U.S. at 729). In at least two respects the case was unlike the instant case. Petitioner there, unlike Chewning, did not request counsel at his habitual criminal proceeding, although he had been a defendant in eight previous trials. Furthermore, the majority opinion found that the only question was that of identity. As demonstrated earlier in this brief, there are many other issues in a Virginia recidivist trial. The Court today seems to have a much more realistic view of such a proceeding, for in the unanimous opinion in *Reynolds* v. *Cochran*, 365 U.S. 525, 531-32, it said that to contend that identity is the only issue "seems to constitute an oversimplification of the matter." It is indeed difficult to reconcile the *Reynolds* and *Gryger* opinions. *Gryger* was not even cited in *Reynolds*. The thrust of *Reynolds* compels the conclusion that *Gryger* has been interred although it was not present at its own funeral. Such a development was inevitable since the *Gryger* majority had relied on the slim majority in *Bute* v. *Illinois* which in turn had relied on the now defunct capital-noncapital distinction of *Betts* v. *Brady*. Thus, like its underpinnings, *Gryger* has succumbed to reason and experience.

"'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." [29] Regardless, therefore, of any one-time justification for the *Betts* v. *Brady* rule, the constitutional right to counsel must be viewed anew today—in the realities of the third quarter of the Twentieth Century. This Court knows, as all the world knows, that Western Civilization is being challenged by massive forces which take a different view of the relation of the individual to the state. The startling awareness of the techniques of the police state—concentration camps, political trials, brainwashing, and so on—which has emerged from World War II and the aftermath, has put the right to counsel in new perspective. This right can now be seen as perhaps the strongest guarantee against such practices. The right to counsel reflects a fundamental difference between Western Civilization's age-long tradition of government under law and the authoritarian views of the opposing forces. "Due process" appropriately embodies such fundamentals. And it is inconceivable that this Court today would hold that in the United States it is compatible with due process for a man to be brought before a court—alone, unassisted, and without money—and sentenced to ten years imprisonment. The Constitution commands that no man's liberty be taken for a long number of years without an opportunity for him to be fairly heard; and to be fairly heard he must have the assistance of legally trained counsel.

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[29] *Griffin* v. *Illinois*, 351 U.S. 12, 20-21 (concurring opinion). See also *Rochin* v. *California*, 342 U.S. 165, 169-72.

III

Petitioner Who Had No Counsel of His Own Was Denied the Equal Protection of the Laws by the Court's Refusal to Allow Him Counsel Because Virginia Law Allows Counsel in Recidivist Trials for Defendants who Are Financially Able to Obtain Counsel.

In the Fourteenth Amendment the Equal Protection Clause and the Due Process Clause constitute two separate prohibitions on state action. Though both clauses embody living, evolving concepts of justice under law and though at times they may overlap, they are nevertheless directed somewhat differently. Wholly apart from due process and the problem raised by *Betts* v. *Brady*, petitioner's right to counsel can be sustained in this case under the Equal Protection Clause.

The proposition involved is simple: equal protection requires that a state have a rational basis for treating individuals or groups differently from other individuals or groups. Money or the lack of it does not supply such a basis for the administration of the criminal law. Therefore if the law allows a defendant with money to have counsel but denies counsel to a defendant without money, the latter is denied the equal protection of the laws.

Griffin v. *Illinois*, 351 U.S. 12, has quickly become a landmark in American constitutional law. Petitioner there had been convicted of a noncapital offense and was allowed an appeal by state law as a matter of right. In order to have trial errors reviewed adequately, however, a transcript was necessary, and that cost money. Petitioner was indigent and therefore could not obtain the needed transcript. This Court held that the state violated both the Due Process and Equal Protection Clauses in that it denied effective appellate review to the poor while making it available to

all who had money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has" (351 U.S. at 19).[40]

This rationale was thereafter applied in *Burns* v. *Ohio*, 360 U.S. 252, and in *Smith* v. *Bennett*, 365 U.S. 708. In *Burns* the requirement by the Ohio Supreme Court of a $20 fee for the filing of an appeal was held violative of equal protection when applied to an indigent defendant attempting to appeal his conviction. And in *Smith* v. *Bennett* the Iowa requirement of a $4 filing fee for habeas corpus petitions was held to deny equal protection to a convicted state prisoner without money.

Shortly after the *Griffin* decision Justice Schaefer of the Illinois Supreme Court, in his Oliver Wendell Holmes Lecture at the Harvard Law School, said:

> *Griffin* v. *Illinois* was based largely, if not entirely, upon the equal protection clause. Shortly stated, it held that since Illinois permits review of all aspects of a criminal case if, but only if, the defendant is able to put before the reviewing court a full transcript of the trial-court proceedings, it must furnish the same review to those who are unable to pay the court reporter for writing up the transcript. The analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so to obtain a different kind of trial, it must furnish the same opportunity to those who are unable to hire a lawyer. Since indigence is constitutionally an irrelevance, it would seem that a successful argument might be based upon the proposition that

[40] *Griffin* was followed in the similar case of *Eskridge* v. *Washington State Board*, 357 U.S. 214.

> the defendant by reason of his poverty is deprived of a right available to those who can afford to exercise it."[41]

The analogy is indeed close—it is compelling. In Illinois a man with money could appeal with a transcript; a man without money could appeal but he would have no transcript. Thus the Court said that for the indigent appellate review would not be "effective" or "adequate." The difference in the kind of trial turned solely on the pocketbook—an irrational and constitutionally impermissible basis for difference in the quality of justice.

In a Virginia recidivist proceeding a man with money gets a trial with counsel; a man without money gets a trial without counsel. Whatever one's views are on the absolute necessity of counsel, it cannot be denied that a defendant with counsel gets a more "adequate" and "effective" hearing —a higher quality trial—than a defendant without counsel. Thus in a recidivist case "the kind of trial a man gets depends on the amount of money he has" (351 U.S. 19). And as the Court said in *Griffin*, "there can be no equal justice" where that is the case.

That the rationale of *Griffin* requires appointment of counsel for an indigent state criminal defendant has been asserted by several other scholars and judges, including United States Circuit Judge Hamley.[42] Professor Walter

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[41] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 10 (1956) (footnote omitted).

[42] Hamley, The Impact of Griffin v. Illinois on State Court-Federal Court Relationships, 24 F.R.D. 75, 79 (1960). In *People* v. *Breslin*, 4 N.Y.2d 73, 149 N.E.2d 85 (1958), a dissenting judge, contending that *Griffin* required appointment of counsel on an indigent's appeal, said: "The Federal cases cited as precedents [*Betts* v. *Brady*, *Bute* v. *Illinois*] have been shorn of their value as controlling authority by the recent decision . . . in *Griffin* v. *Illinois*. . . ." (4 N.Y.2d at 79, 149 N.E.2d at 88). See also Judge Traynor's opinion in *People* v. *Brown*, 357 P.2d 1072, 1076 (Calif.

Gellhorn, in his recent book, *American Rights,* discusses the right to counsel in connection with *Griffin* v. *Illinois* and *Burns* v. *Ohio* and concludes: "There is a very close resemblance between these two cases and the right-to-counsel case. The lesson they seemingly teach is that the nature and effectiveness of procedural safeguards should never be allowed to hinge on the size of the defendant's pocketbook." [43] And more emphatically, it has been said that the application of *Griffin* to the counsel cases "should be inevitable." [44] With this the petitioner here agrees.

The idea behind *Griffin* and its progeny is not really new. Two decades ago a member of this Court wrote: "The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." [45] Imagine a law which had the effect of allowing counsel to defendants of one race but not to defendants of another race. Or a law which would allow counsel to a defendant only if he had a net worth of $5,000. That such would be unconstitutional is hardly debatable. Here the law of Virginia has substantially the same effect: it allows counsel to a recidivist defendant with money; it denies counsel to a recidivist defendant without money. In doing so it has denied to petitioner the equal protection of the laws because it bases the right to counsel solely on money. Surely

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1960). See Note, Indigent's Right to Counsel on Appeal, 11 W.Res. L. Rev. 649 (1960). That *Griffin* requires appointment of counsel in the trial court has been argued in the Fourth Circuit; although the court set out the argument, it found the question unnecessary for decision. *Holly* v. *Smyth,* 280 F.2d 536, 541-42 n. 8 (4th Cir. 1960).

[43] Gellhorn, American Rights 24 (1960).

[44] Willcox and Bloustein, The Griffin Case—Poverty and the Fourteenth Amendment, 43 Corn. L. Q. 1, 23 (1957).

[45] *Edwards* v. *California,* 314 U.S. 160, 184-85 (concurring opinion).

counsel is as important to an "adequate" and "effective" defense as a transcript.

This point was anticipated long ago by two able lawyers in their criticism of *Betts* v. *Brady*:

> Certainly if the defendant had been able to employ counsel the Maryland court would not have denied him the right to be represented by counsel. . . . If defendants with means have the right to employ counsel to represent them where accused of serious crime, it is difficult to maintain that indigent persons are in fact accorded the equal protection of the laws when that right is denied them because they are not in possession of funds.[46]

Beginning with *Griffin* in 1956 this Court has several times squarely recognized the proposition that when the state moves to take a man's liberty the constitutional safeguards which surround him cannot be diluted by the state because of his poverty. Naturally and inevitably this proposition must extend to the right of representation by counsel. This right is the most basic of all, for without it all other rights are meaningless.

Accordingly this case can and should be decided for petitioner under the Equal Protection Clause. The decision can rest on this ground alone, without reference to the Due Process Clause, although happily both of these Fourteenth Amendment safeguards have now reached the same point along the path of human decency.

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[46] Letter from Benjamin V. Cohen and Erwin N. Griswold to the Editor of the N. Y. Times, N. Y. Times, Aug. 2, 1942, § 4, p. 6E, cols. 5, 6, 7.

CONCLUSION

For all of the reasons set forth, it is submitted that the trial and sentencing of petitioner without counsel violated both the Due Process and Equal Protection Clauses. Thus if petitioner proves his allegations he is entitled to release from imprisonment under his ten-year recidivist sentence. The Virginia courts accordingly erred in dismissing his habeas corpus petition. The judgment of the Supreme Court of Appeals of Virginia should therefore be reversed and the case remanded with directions that petitioner be accorded a hearing.

Respectfully submitted,

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Counsel for Petitioner

August, 1961

APPENDIX

Habitual Criminal or Recidivist Laws in the United States

The accompanying table lists all state statutes of the general multiple-offender type. These vary considerably in their details. Such laws exist in all states except Hawaii, Maryland, Mississippi, and North Carolina. There is no general federal recidivist statute, although there are several provisions in federal law dealing with subsequent offenders in certain cases.

Procedurally, it appears that 18 states authorize an independent, separate trial for the habitual criminal charge: Alaska, Delaware, Florida, Illinois, Louisiana, Minnesota, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Virginia, West Virginia, Wisconsin.

Where there is no separate proceeding the case is combined in some fashion with the trial of a principal offense. The habitual criminal charge may be tried concurrently with the principal offense, or there may be provisions for trying it immediately following.

The prescribed sentences vary widely, as does the number of prior convictions required for various sentences. Life imprisonment is expressly authorized under some circumstances in 26 states: Alaska, California, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wyoming.

In other states, such as Virginia, life imprisonment is not expressly authorized, but it appears to be allowable.

There is a survey of many of the legal problems which arise under these statutes in Note, *Court Treatment of*

General Recidivist Statutes, 48 Colum. L. Rev. 238 (1948). There are specific discussions of the laws of three states in the following: Brown, *West Virginia Habitual Criminal Law,* 59 W. Va. L. Rev. 30 (1956); Note, *New Jersey's Habitual Criminal Act,* 11 Rutgers L. Rev. 654 (1957); Comment, *Out of Sight, Out of Mind: The Plight of the Habitual Criminal,* 26 Tenn. L. Rev. 259 (1959).

For additional material on recidivist laws in the United States see the authorities cited in notes 8, 18, 19, 21, *supra.*

Habitual Criminal or Recidivist Laws in the United States

Ala. Code tit. 15, § 331 (1958)
Alaska Comp. Laws (Territorial) §§ 66-21-1 - 66-21-5 (1949)
Ariz. Rev. Stat. §§ 13-1649, -1650 (1956)
Ark. Stat. §§ 43-2328 - 43-2330 (Supp. 1959)
Cal. Penal Code §§ 644, 1093
Colo. Rev. Stat. ch. 39, §§ 13-1 - 13-3 (1953)
Conn. Gen. Stat. Ann. §§ 54-118 - 54-121 (1958)
Del. Code Ann. tit. 11, § 3911 (Supp. 1960)
Fla. Stat. Ann. § 775.11 (1941), § 115.09 (Supp. 1960)
Ga. Code Ann. § 27-2511 (Supp. 1958)
Idaho Code tit. 19, § 2514 (1947)
Ill. Ann. Stat., tit. 3, §§ 603.2 - .9 (Supp. 1960)
Ind. Stat. Ann. §§ 9-2207, 2208 (1956 Replacement Vol.)
Iowa Code Ann. §§ 747.1 - .7 (1946)
Kan. Gen. Stat. § 21-107a (1949)
Ky. Rev. Stat. § 431.190 (1955)
La. Rev. Stat. tit. 15, § 529.1 (1950)
Me. Rev. Stat., ch. 149, § 3 (1954)
Mass. Gen. Laws Ann. ch. 279, § 25 (1958)
Mich. Stat. Ann. §§ 28.1082 - .1085 (1936)
Minn. Stat. Ann. ch. 610, §§ 28 - 31 (1945)
Mo. Ann. Stat. §§ 556.280 - .290 (Supp. 1960)
Mont. Rev. Code §§ 94-4713 - 94-4715 (1947)
Neb. Rev. Stat. §§ 29.2221, .2222 (Reissue Vol. 1956)
Nev. Rev. Stat. §§ 207.010 - .020 (1960)
N.H. Rev. Stat. Ann. §§ 591:1, :2 (1955)
N.J. Stat. Ann. §§ 2A:85-8 - 85-13 (Supp. 1960)
N.M. Stat. Ann. §§ 41-16-1 - 41-16-4 (1953)
N.Y. Consol. Laws Serv. §§ 1020, 1940, 1942 (1951), §§ 1941, 1943 (Supp. 1960)
N.D. Century Code Ann. §§ 12-06-18 - 12-06-23, 14-03-07 (1960)
Ohio Rev. Code Ann. §§ 2961.11 - .13 (1953)
Okla. Stats. tit. 21, §§ 51, 54 (1951)
Ore. Rev. Stat. §§ 132.540, 168.011 - .050 (Replacement Part) (1959)
Pa. Code Ann. tit. 18, § 5108 (1939)

R.I. Gen. Laws § 12-19-21 (1956)
S.C. Code §§ 16-21 - 16-23 (1952)
S.D. Code § 13.0611 (1939)
Tenn. Code Ann. §§ 40-2801 - 40-2807 (1955)
Tex. Penal Code tit. 2, arts. 61-64 (1952)
Utah Code Ann. tit. 76, §§ 1-18, 1-19 (1953)
Vt. Stat. Ann. tit. 13, § 11 (1958)
Va. Code Ann. § 53-296 (1950)
Wash. Rev. Code § 9.92.090 (1956)
W. Va. Code Ann. §§ 6130-31, 6260 (1955)
Wis. Stat. Ann. §§ 939.62, 959.12 (1958)
Wyo. Stat. §§ 6-9 - 6-11 (1957)

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Supreme Court of the United States

October Term, 1961

No. 63

MORGAN C. CHEWNING,
Petitioner

v.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Respondent

MOTION TO DISMISS THE WRIT OF CERTIORARI
AND
BRIEF ON BEHALF OF THE RESPONDENT

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Richmond 19, Virginia

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Supreme Court of the United States

October Term, 1961

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MORGAN C. CHEWNING,

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v.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Respondent

MOTION TO DISMISS THE WRIT OF CERTIORARI AND BRIEF ON BEHALF OF THE RESPONDENT

OPINION BELOW

The Supreme Court of Appeals of Virginia did not write an opinion in the case at bar, but entered an order denying and dismissing the petition for a writ of certiorari (R. 29) and affirming the judgment of the Law and Equity Court of the City of Richmond (R. 13). Honorable Robert Lewis Young, one of the judges of the Law and Equity Court of the City of Richmond, wrote a short memorandum opinion which is found in the printed record commencing on page 9.

JURISDICTION

The petitioner purports to have invoked the jurisdiction of this Court under the provisions of Title 28 U. S. C.

§1257(3). Petitioner has alleged in this Court that he has been denied a right guaranteed to him by the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States. This Court granted petitioner's motion to proceed in forma pauperis and granted certiorari on March 6, 1961.

MOTION TO DISMISS THE WRIT OF CERTIORARI

Respondent, by counsel, moves this Court to dismiss the writ of certiorari granted by this Court on March 6, 1961, for the reason that said writ was improvidently granted.

ARGUMENT

The Writ of Certiorari Should Be Dismissed for the Reason That It Was Improvidently Granted

The respondent earnestly believes that this Honorable Court upon a reconsideration of the record in this case will find that the Federal constitutional question now raised by petitioner in this Court was not presented to the Law and Equity Court of the City of Richmond in the petition for a writ of habeas corpus which forms a basis for this proceeding. Essential to the understanding of the respondent's position in the premises is a careful examination of the record in the case at bar. It is well settled that this Court will not consider a Federal constitutional question unless it is presented in clean-cut, concrete and unclouded form. *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549. It will be hereinafter demonstrated that the petition for a writ of habeas corpus filed by the petitioner, Morgan C. Chewning, in the Law and Equity Court of the City of Richmond did not raise any Federal constitutional question.

Chewning's claims for relief were based upon alleged violations of a State statute and a provision of the Constitution of the Commonwealth of Virginia.

It is well settled that the well-pleaded allegations of the petition must be accepted as true when they are not denied by the State. *Cash* v. *Culver*, 358 U. S. 633; *Hawk* v. *Olson*, 326 U. S. 271; *Morris* v. *Smyth*, 202 Va. 832, 120 S. E. 2d 465. Indeed, petitioner on page 4 of his brief concedes the preceding statement to be true. Moreover, petitioner in his brief relies on the petition for a writ of habeas corpus, and the two exhibits attached thereto which are printed on pages 1 through 7 of the record. Let us then examine carefully the petition for a writ of habeas corpus filed by petitioner in the Law and Equity Court of the City of Richmond.

Petitioner's grounds for relief are set forth on pages 2 and 3 of the printed record. Petitioner's first contention is quoted below:

> "That the Circuit Court of the City of Richmond, Virginia proceeded to try and convict, and sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year of said sentence suspended, without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th day of June, 1958." (R. 2)

Petitioner's first allegation can, therefore, be summarized, "I was tried without assistance of counsel although I requested assistance of counsel." It is of paramount importance to emphasize that petitioner fails to state any reason why he requested that the court provide him with counsel. He carefully avoids a statement that he was a pauper, an indigent, or that he was without funds at the time of his recidivist hearing. He does not allege any of the foregoing

facts. He merely states that he wanted assistance of counsel. It is manifest that this bare allegation presents no question, State or Federal. Respondent can find no case which holds that petitioner would be entitled to court-appointed counsel in any case in the absence of a statement of poverty, or an allegation that he is indigent and without funds. The record is completely silent as to petitioner's financial condition on June 25, 1958, the day on which his recidivist hearing took place. We cannot add to or subtract from petitioner's allegation in this regard, but are bound by the aforementioned cases which hold that his allegations must be accepted as true. It is manifest that even in a criminal case the court is not obliged to appoint counsel for an accused who does not assert that he is without funds to employ a lawyer. Petitioner does not elaborate on the bare statement that he was tried without counsel. Petitioner's statement in this regard is incomplete, and one can only speculate as to the facts surrounding his trial.

Petitioner relies on § 19-214.1 of the Code of Virginia, 1950, as amended (now § 19.1-241 of the Code of Virginia), and Section 8 of the Virginia Constitution. Petitioner states in his petition:

> "Your petitioner further says that in the Courts of the Commonwealth of Virginia, before an accused person can be tried and convicted, and sentenced to imprisonment in the Virginia State Penitentiary, if he is without the aid of a competent attorney at law to represent him, that under the provisions of Section 19-214.1 of the Code of Virginia (1952), and Article 1, Section Eight of the Constitution of the Commonwealth of Virginia, the Court must first appoint to the accused, an attorney at law to represent him; that said Section 19-214.1 of the Code of Virginia, reads:" (R. 2)

Section 19-214.1 (now §19.1-241) of the Code of Virginia reads as follows:

> "§19.1-241. Appointment of defense counsel in felony cases.—In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him. (Code 1950, §19-241.1; 1952, c. 348; 1960, c. 366.)"

This statute is applicable only to felony prosecutions. Did petitioner stand charged with a felony? The answer to this question is provided by the Supreme Court of Appeals of Virginia in the case of *King* v. *Lynn, Sup't.*, 90 Va. 345, 185 S. E. 439. In any event, petitioner relied herein on an enactment of the General Assembly of the Commonwealth of Virginia. He did not rely on any right guaranteed to him by the Federal Constitution, nor does he relate this provision of the Code of Virginia to any provision of the Constitution of the United States. He has, therefore, failed to claim, allege or assert any Federal constitutional right in connection with this statute.

Section 8 of the Constitution of Virginia is set forth below:

> "Concerning criminal prosecutions generally.—That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

> "Laws may be enacted providing for the trial of offenses not felonious by a justice of the peace or other inferior tribunal without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.
>
> "In criminal cases, the accused may plead guilty; and, if the accused plead not guilty, with his consent and the concurrence of the Commonwealth's attorney and of the court entered of record, he may be tried by a smaller number of jurors, or waive a jury. In case of such waiver, or plea of guilty, the court shall try the case."

Petitioner's second basis for relief is grounded upon the above-quoted provision of the Constitution of Virginia. He has again failed to relate this provision of the Virginia Constitution to any right guaranteed to him by the Federal Constitution. Petitioner does not here rely upon any Federal constitutional right. Indeed, he does not mention any provision of the United States Constitution.

The petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond reads in part as follows:

> "Your petitioner further says that the said Circuit Court of the City of Richmond, Virginia, on the 25th day of June, 1958, did not have the jurisdiction, power and authority, to proceed against the petitioner, to convict the petitioner, and to sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year suspended, without the assistance of counsel to represent him." (R. 3)

Petitioner fails to state the legal basis for this statement. It can only be concluded that this statement relates back to his allegations made in connection with the Virginia statute and the provision of the Virginia Constitution hereinbefore set forth. Petitioner does not state that he is relying upon any right guaranteed to him by the United States Constitution.

In conclusion Chewning says in his petition for a writ of habeas corpus:

> "Your petitioner further says that said ten-year sentence, with one-year suspended, was void because the Circuit Court of the City of Richmond failed to comply with the laws of the Commonwealth of Virginia, to-wit: Section 19-214.1 of the Code of Virginia, and the Supreme Court's ruling in Watkins v. Commonwealth, 174 Va. 518, then in effect in the Commonwealth of Virginia; and which statute and ruling of law was, and is still in effect." (R. 3)

In summing up the legal basis for his contention that he is being illegally detained, petitioner again makes reference to §19-214.1 of the Code of Virginia, 1950, as amended (now §19.1-241), and Section 8 of the Virginia Constitution. He does not rely on any provision of the United States Constitution in asserting that he was entitled to counsel under the facts as stated in his petition.

Respondent has endeavored to set forth in careful and complete detail petitioner's contentions as contained in his petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond. This petition forms the basis for this proceeding. Respondent has demonstrated conclusively the following facts:

1. Petitioner does not allege or suggest that he was indigent, that he was a pauper or that he was without funds at the time he asked for assistance of counsel. He does not state that he told the court that he was a pauper, an indigent, or that he was without funds.

2. Petitioner relies on § 19-214.1 of the Code of Virginia, 1950 (now § 19.1-241), and contends that this statute required the Judge of the Circuit Court of the City of Richmond to appoint counsel to represent him.

3. Petitioner relies on Section 8 of the Constitution of Virginia and suggests that this provision of the Constitution required the Judge of the Circuit Court of the City of Richmond to appoint counsel to represent him.

4. Petitioner has failed to mention anywhere in the petition for a writ of habeas corpus the words United States Constitution, Federal Constitution, Fourteenth Amendment to the Constitution of the United States, or a right guaranteed by the United States Constitution.

In further support of respondent's position in the premises, we quote from page 5 of the brief on behalf of the petitioner wherein petitioner summarizes the allegations as made in the petition:

> "Petitioner alleges that the Court proceeded to try, convict and sentence him to ten years imprisonment 'without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958.'" (R. 2)

It is submitted that petitioner has failed to allege, state or suggest in the petition for a writ of habeas corpus which

he filed below that he was a pauper, an indigent, or that he was without funds on June 25, 1958. Moreover, in this connection, it is important to examine petitioner's summary of argument on pages 8, 9 and 10 of the brief filed in this Court. In the paragraphs headed I and II, petitioner does not state that he was an indigent on August 25, 1958. It is not until we examine the paragraph headed III that we find for the first time that petitioner rather blithely states that he was indigent on June 25, 1958. For the very first time petitioner has stated in his brief filed in this Court that he was indigent when he was tried as a third-time offender. Moreover, in summarizing his position in the case at bar in the section of his brief headed Argument, commencing on page 10 of his brief, petitioner asks this Court to reverse the judgment of the Supreme Court of Appeals of Virginia and remand the case for a hearing. Petitioner does not suggest therein that he was indigent at the time of his trial as a third-time offender.

Let us examine very briefly the opinion of the trial judge, Honorable Robert Lewis Young, which is found on pages 9 through 12 of the printed record. Judge Young never finds as a fact that the petitioner, Morgan C. Chewning, was an indigent at the time of the recidivist proceeding, which took place on June 25, 1958. The word "pauper" or "indigent" does not appear in Judge Young's opinion. Judge Young never suggests that Chewning was indigent or without funds on June 25, 1958. The facts which Judge Young accepts as true are the facts which were set forth in the petition for a writ of habeas corpus then pending before him. As we have repeatedly emphasized, petitioner does not allege, state or suggest that he was a pauper when he was tried as a third-time offender, and Judge Young finds this to be true.

Judge does state in his memorandum opinion that petitioner relies on the Fourteenth Amendment to the Constitution of the United States. Respondent has been unable to ascertain the basis for this statement in view of the contents of the petition. Moreover, Judge Young discusses at length the fact that petitioner relies upon a Virginia statute and a provision of the Constitution of Virginia. Judge Young finds that the petitioner's reliance upon the aforesaid provision of law and provision of the Constitution of Virginia is not well placed, and that the same did not require the Judge of the Circuit Court of the City of Richmond to appoint counsel to represent Chewning when he was tried as a third-time offender. In any event, it is manifest that in mentioning the Fourteenth Amendment to the Constitution of the United States, Judge Young has considered something which is not contained in the petition.

Moreover, Judge Young was without authority to reach a decision on the merits of the case. This Court's attention is directed to the provisions of §8-598 of the Code of Virginia, 1950, as amended, which is set forth below:

> "§8-598. How directed and returnable.—The writ shall be directed to the person in whose custody the petitioner is detained and shall be made returnable as soon as may be before the court or judge ordering the same or any other of such courts or judges.
>
> "And it is further provided that in the event the allegations of illegality of the petitioner's detention present a case for the determination of unrecorded matters of fact relating to any previous judicial proceeding, such writ, if issued, shall be made returnable before the court in which such judicial proceeding occurred. (Code 1919, §5849; 1958, c. 215.)"

Judge Young had two choices. He could determine that the petitioner's allegations, if true, presented a case wherein

a hearing should be held. Judge Young could then have issued a writ of habeas corpus and made the same returnable to the Circuit Court of the City of Richmond, pursuant to §8-596 of the Code of Virginia. Chewning was then detained within the jurisdiction of the Law and Equity Court of the City of Richmond. *Morris* v. *Smyth*, 202 Va. 832, 120 S. E. 2d 465. In the alternative, Judge Young could deny the petition on the ground that the allegations were insufficient to justify a hearing. It is manifest that Judge Young was not presented with a pure question of law which he could decide without taking evidence. Judge Young was clearly without authority to take any action on the petition other than that outlined above.

It is important to note that petitioner was represented at the time he filed his petition for a writ of habeas corpus by court-appointed counsel. Said counsel could have amended the petition to include additional facts not set forth therein, and if this had been done, it is possible that this case would be in a different posture. It is of particular importance to emphasize that said counsel did not amend the petition. We are, therefore, limited in the premises to a consideration of the petition as filed.

Petitioner has failed to state sufficient facts in connection with the action of the Judge of the Circuit Court of the City of Richmond in refusing to appoint counsel to represent him at his recidivist hearing. Counsel for petitioner was appointed with his consent and the order of the Law and Equity Court of the City of Richmond, of February 5, 1960, denying and dismissing the petition for a writ of habeas corpus states that said attorney "having fully and ably performed" his duties, he is discharged from further responsibility in this matter. It can only be concluded that court-appointed counsel conferred with Chewning and de-

termined that there were no additional allegations which could be made.

Let us examine briefly the decision of the Supreme Court of Appeals of Virginia of June 14, 1960 wherein the petition for a writ of error was denied. The Court wrote no opinion, and we must therefore look to the applicable statutes of Virginia and the decisions of the Supreme Court of Appeals to determine the import of this decision. As heretofore emphasized, the statutes of Virginia, to-wit: 8-596 and 8-598 of the Code of Virginia, 1950, as amended, are controlling herein. The Supreme Court of Appeals was called upon by the petition for a writ of error to determine whether or not the decision of the Law and Equity Court of the City of Richmond was correct, i.e., should the petition for a writ of habeas corpus have been dismissed? The Judge of that Court was clearly without authority to hold a hearing on the petition. Indeed, on page 6 of petitioner's brief, footnote 3, this fact is admitted. The Supreme Court of Appeals of Virginia stated in the case of *Penn* v. *Smyth*, 188 Va. 368, 49 S. E. 2d 610: "It is elementary that a petition of this nature must allege facts and that mere conclusions or opinions of the pleader will not suffice to make out a case." It is manifest that Court must have refused the petition for a writ of error on the ground that petitioner had failed to state a case, and that, in any event, Judge Young could not hold a hearing on said petition. When petitioner filed his petition for a writ of error (R. 19-28) he raised a Federal constitutional question for the first time. He had not heretofore mentioned said question. Moreover, an examination of the petition for a writ of error reveals that petitioner raises several questions which were not mentioned in the petition for a writ of habeas corpus. In addition, petitioner alleges facts which were not set forth in the petition

filed in the Law and Equity Court. It is significant to note that petitioner does not state in his petition for a writ of error that he was indigent when he was tried as a third-time offender. The Court could only conclude that petitioner had failed to state a case.

It is well settled that the record must establish that the Federal constitutional question was raised by petitioner, and that the State found or was required to find that said Federal claim was presented to it. *Newsom* v. *Smyth,* 5 L. Ed. 2d 803. Respondent has clearly demonstrated first that the petition for a writ of habeas corpus did not present sufficient facts to justify any action of the Law and Equity Court of the City of Richmond other than dismissal. Respondent has shown that petitioner did not raise any Federal constitutional question in his petition for a writ of habeas corpus. Respondent has emphasized repeatedly that petitioner has failed to assert, allege or suggest that he was a pauper at the time of his trial as a third-time offender. Moreover, as petitioner has progressed from the Law and Equity Court to the Supreme Court of Appeals of Virginia and thence to this Court, he has continued to allege additional facts and further claims for relief. Indeed, in his brief filed in this Court, petitioner has alleged even more facts which were not set forth in the pleadings and papers heretofore filed.

We submit that the petition for a writ of habeas corpus does not raise a Federal question, and that said Federal question was not decided by the Supreme Court of Appeals of Virginia. Respondent has demonstrated that there is considerable uncertainty as to the precise grounds for the decision of the Supreme Court of Appeals of Virginia in the case at bar, and urges this Court to decline to review the Federal question now asserted to be present. It is well settled that under these circumstances, this Court will not

attempt to review a Federal question which is presented to it for the first time in the history of the proceedings. *Minnesota* v. *National Tea Company*, 309 U. S. 551.

CONCLUSION

For the reasons hereinbefore stated, it is earnestly submitted that the writ of certiorari should be dismissed as improvidently granted.

BRIEF ON BEHALF OF THE RESPONDENT

PRELIMINARY STATEMENT

Respondent earnestly believes that this Court upon consideration of the foregoing motion and argument made in support thereof will dismiss the writ of certiorari heretofore granted petitioner in this case. Out of an abundance of precaution, however, respondent files this brief in the case at bar.

Respondent finds it most difficult to answer the many arguments made by petitioner in his brief for the reason that the same are grounded upon the assumption that the petitioner was indigent at the time he was tried as a third-time offender, and that he raised a Federal constitutional question in the petition for a writ of habeas corpus filed in the Law and Equity Court of the City of Richmond. Moreover, respondent is faced with the problem of answering many other factual allegations which are not contained in the petition filed below. In addition, petitioner has made several assumptions and conclusions of law in connection with the Virginia statutes in question which are manifestly of his own belief and are not supported by any decision of

the Supreme Court of Appeals of Virginia. Furthermore, petitioner has so intermingled the foregoing that it is virtually impossible to separate the "wheat from the chaff."

QUESTION PRESENTED

Is a prisoner who is proceeded against as a third-time offender in conformity with § 53-296 of the Code of Virginia (1950) entitled to court-appointed counsel in the absence of any statement by said prisoner that he is indigent or that he is a pauper?

ARGUMENT

A Prisoner Who Is Proceeded Against as a Third-Time Offender in Conformity With Section 53-296 of the Code of Virginia (1950) Is Not Entitled to Court-Appointed Counsel in the Absence of Any Statement by Said Prisoner That He Is Indigent or That He Is a Pauper.

Petitioner and respondent are in full agreement that the facts as set forth in the petition for a writ of habeas corpus must be accepted as true. Petitioner was proceeded against as a third-time offender in conformity with the provisions of § 53-296 of the Code of Virginia (1950) which is set forth below:

> "§ 53-296. Convicts previously sentenced to like punishment; additional confinement.—When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an

information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury of bystanders shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, the court may sentence him to further confinement in the penitentiary for a period of not exceeding five years, if he has been once before sentenced in the United States to confinement in the penitentiary; but if he has been twice sentenced in the United States to such confinement, he may be sentenced to be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny. (Code 1919, §5054; 1948, p. 826; R. P. 1948, §53-296.)"

Petitioner appeared in the Circuit Court of the City of Richmond on June 25, 1958 to answer the Information filed by the Attorney for the Commonwealth for the City of Richmond. He asked the Court to appoint counsel to represent him, which request was refused, whereupon the Court ordered that he be confined in the penitentiary for a period of ten years and suspended one year of said sentence.

The foregoing are the facts as set forth by petitioner in his petition for a writ of habeas corpus, and form the sole and entire basis for this proceeding.

The purpose of § 53-296 of the Code of Virginia (1950) was outlined by the Supreme Court of Appeals of Virginia in *Wesley* v. *Commonwealth*, 190 Va. 268, 56 S. E. 2d 362:

> "The underlying and paramount purposes of the statute are to protect society against habitual criminals and to impose further punishment against that particular class of offenders." (190 Va. at page 276)

It is well settled that the sole question before the Circuit Court of the City of Richmond on June 25, 1958 was that of identification. Was Morgan C. Chewning, who then stood before the Court, the person named in the Information? *King* v. *Lynn*, 90 Va. 345, 18 S. E. 439. The exact nature of this proceeding, however, has never been determined by the Supreme Court of Appeals of Virginia. It has spoken of the statute as "highly penal," and as such subject to strict construction. *Wesley* v. *Commonwealth*, *supra*. But the Court has never determined the character of the proceeding. Petitioner has asserted in his brief that the recidivist proceeding is "clearly criminal," but he has failed to cite a Virginia case in support of his theory. Indeed, this Court held in connection with a similar West Virginia statute in the case of *Graham* v. *West Virginia*, 224 U. S. 616, as follows:

> *"By this proceeding he was not held to answer for an offense; the information did not allege crime.* As was said by the Supreme Court of Appeals of West Virginia: 'It (the information) alleges that he has been held to answer for crime, and that he stands convicted of it through the indictment of a grand jury. It points

> him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment. . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened.' " (Italics supplied)

This Court said in *Gryger* v. *Burke*, 334 U. S. 728, 732:

> "* * * The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. Cf. Moore v. Missouri, 159 U. S. 673, 40 L. Ed. 301, 16 S. Ct. 179; McDonald v. Massachusetts, 180 U. S. 311, 45 L. Ed. 542, 21 S. Ct. 389; Graham v. West Virginia, 224 U. S. 616, 56 L. Ed. 917, 32 S. Ct. 583; Carlesi v. New York, 233 U. S. 51, 58 L. Ed. 843, 34 S. Ct. 576; Pennsylvania ex. rel. Sullivan v. Ashe, 302 U. S. 51, 82 L. Ed. 43, 58 S. Ct. 59."

Petitioner has failed to cite one case that holds that in the absence of a statement by the accused that he is indigent, that he is entitled to have counsel appointed to represent him, even in a criminal proceeding. The reason for this failure is explained by the fact that there is no reported case which so holds. It is, therefore, quite clear that a person who is not indigent is not entitled to court-appointed counsel in a criminal proceeding. It follows from this that a prisoner who is not indigent is not entitled to court-appointed counsel in a recidivist proceeding.

Moreover, petitioner has failed to cite a decision of this Court which holds that even an indigent convict is entitled to court-appointed counsel in a recidivist proceeding. On page 15 of his brief he cites *Reynolds* v. *Cochran*, 365 U. S.

525, and *Chandler* v. *Fretag*, 248 U. S. 3. In both of these cases this Court held that a person proceeded against as a multiple offender has the constitutional right to the assistance of his own counsel. This decision of the Court in both cases rested upon this narrow ground.

Hudson v. *North Carolina*, 363 U. S. 697, and *Ferguson* v. *Georgia*, 365 U. S. 570, cited by petitioner on page 29 of his brief involved factual situations which are in no way similar to the facts in the case at bar, and consequently are not applicable herein.

Of course, *McNeal* v. *Culver*, 365 U. S. 109, cited on page 28 of petitioner's brief; *Williams* v. *Kaiser*, 323 U. S. 471, and *Powell* v. *Alabama*, 287 U. S. 45, cited on page 31 of petitioner's brief, are not applicable herein because in all three of these cases the petitioner was indigent at the time he was tried. For the same reason *Griffen* v. *Illinois*, 351 U. S. 12, found on page 40 of petitioner's brief, *Burns* v. *Ohio*, 360 U. S. 252, and *Smith* v. *Bennett*, 365 U. S. 708, found on page 41 of petitioner's brief, are not applicable herein.

Petitioner states on page 32 of his brief "The only possible argument that can be made against granting petitioner relief is the now out-moded distinction between capital and non-capital State criminal cases. That distinction, applied to the right to counsel and to no other constitutional right, stems from Betts v. Brady, 316 U. S. 455." The General Assembly of Virginia recognized the need for counsel in all felony prosecutions and, in 1948, § 19-278.1 of the Code of Virginia was enacted (see Reorganization Provisions, Code of Virginia). This section is now § 19.1-241 of the Code of Virginia, 1950. As hereinbefore pointed out, a recidivist proceeding in Virginia is for the sole purpose of establishing the identity of the prisoner, and is not a felony prosecu-

tion. In any event, this Court's holding in *Betts* v. *Brady*, 316 U. S. 455, has yet to be overruled, and there is no cause to do it in the case at bar.

In the instant case, the circumstances are of such character as to indicate that the petitioner failed to state a case. Petitioner alleges only that he was denied assistance of counsel at his recidivist hearing. This is the sole basis for relief as set forth in his petition. We submit that petitioner has failed to show sufficient factual data to justify a hearing below.

Moreover, petitioner's arguments are foreclosed by this Court's holding in *Gryger* v. *Burke*, 334 U. S. 728, wherein this Court stated that in the absence of exceptional circumstances, the State is not required to provide counsel for a defendant in a recidivist proceeding.

To sum our position in the case at bar, we quote the following statement which is found on page 27 of petitioner's brief:

"LAW ADDRESSES ITSELF TO ACTUALITIES."[1]

Respondent submits that petitioner failed to allege sufficient facts in his petition for a writ of habeas corpus. Petitioner did not allege that he was indigent, that he was a pauper or that he was without funds on June 25, 1958. Petitioner alleged only that he was denied court-appointed counsel. Petitioner was represented at his habeas corpus proceeding by counsel, and said counsel did not amend the petition to include any additional facts. The reality of the situation is that the colloquy between the Court and the petitioner on June 25, 1958 is unknown at this time. Petitioner has cited no decision of this Court which supports

[1] *Griffin* v. *Illinois*, 351 U. S. 12, 23 (concurring opinion).

the view that in the absence of a statement of poverty or an allegation of indigency an accused is entitled to court-appointed counsel on a criminal charge in the trial court. It is, therefore, manifest that in the absence of a statement of poverty, a prisoner is not entitled to court-appointed counsel at the time he is proceeded against as a multiple offender.

CONCLUSION

For the foregoing reasons, counsel for the respondent earnestly submits that petitioner has failed to present a Federal constitutional question, and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1961

No. 63

MORGAN C. CHEWNING,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

REPLY BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS
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REPLY BRIEF FOR THE PETITIONER

This reply brief is directed to the contention in respondent's brief that the record does not show that petitioner's federal constitutional right to counsel was adequately raised in the state courts. This brief will demonstrate that respondent's arguments are without merit and that the case is within the provisions of 28 U.S.C. §1257(3).

Petitioner's brief, at pages 4-7, traces the proceedings in the state courts. When the proceedings are viewed against Virginia law and decisions of this Court, it is clear that the federal claim which petitioner now urges here was raised and actually litigated in the Virginia courts. Moreover, the

judgment cannot be supported by an independent state ground.

Respondent's contention appears to be based on two alleged pleading defects: (1) he says that petitioner, in his habeas corpus petition, did not specifically aver that he was indigent at his recidivist trial; (2) respondent further argues that petitioner, in his habeas corpus petition, did not expressly mention the Federal Constitution. These points will be disposed of in this order.

1. Respondent's argument directed to the lack of a specific averment of indigency confuses pleading with proof, is unsupported by anything in Virginia law and is contrary to this Court's previous decisions.

Petitioner's brief of course goes on the premise that the Fourteenth Amendment right to have court-appointed counsel covers only defendants financially unable to obtain counsel. There is no suggestion in the record or petitioner's brief to the contrary. If at a hearing on this habeas corpus petition the evidence showed that at his recidivist trial petitioner had been financially able to get a lawyer but voluntarily chose not to do so, the court at that time would be justified in holding under those facts that a violation of the right to counsel had not been established. But here there has been no hearing. Petitioner has been denied that opportunity by the courts below. There are no evidentially established facts before the Court, only allegations. Respondent has confused the requirements of proof with those of pleading. Although the fact of indigency is an element of the federal right invoked, it does not follow that this element must be expressly pleaded. It is significant that respondent cites no decision, rule or statute which renders a habeas corpus petition fatally defective because it does

not explicitly aver indigency. Indeed, on authority and principle there is no such pleading requisite.

Section 8-596 of the Virginia Code provides that the writ of habeas corpus "shall be granted forthwith" to any person showing "probable cause to believe that he is detained without lawful authority."[1] The Law and Equity Court, considering all the allegations of the petition, concluded that there was no probable cause; thus it did not grant the writ.[2] In deciding this the court made no mention of any pleading defect or of any want of sufficient allegation. Instead the court squarely decided petitioner's federal constitutional claim, holding that under *Gryger* v. *Burke*, 334 U.S. 728, there was no right to counsel at a recidivist trial (R. 9). This view of the pleading by a Virginia judge goes far in itself to refute respondent.

While there is no Virginia case law precisely in point, the Virginia view of pleadings generally is illuminating, since habeas corpus is a civil action. *Smyth* v. *Godwin*, 188 Va. 753, 51 S.E.2d 230 (1949). As there was no response

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[1] Habeas corpus is an appropriate remedy in Virginia for a prisoner attacking his sentence on federal constitutional grounds. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953). Respondent does not dispute this.

[2] Respondent's intimation (Respondent's Brief, pp. 10-11) that the Law and Equity Court was without authority to entertain this habeas corpus petition and to grant the writ is wholly without merit. The habeas corpus jurisdiction of that court appears unequivocally from a reading together of sections 17-147, 17-164, and 8-596 of the Virginia Code. Respondent actually refutes his own point as the top of page 11 of his brief. If the Law and Equity Court had granted the writ, which it refused to do, and if a hearing had been held on petitioner's allegations, that hearing would have been conducted in the sentencing court, the Circuit Court of the City of Richmond. Virginia Code, 1950, §8-598 (1960 Supp.). But this in no way affects the power of the Law and Equity Court to pass on the petition, as it did here, and either dismiss it or grant the writ. *Morris* v. *Smyth*, 202 Va. 832, 120 S.E.2d 465 (1961).

filed to the petition, the posture of the case is analogous to that of a complaint met by a demurrer. That is, the petition is to be tested on its face, assuming all of its allegations to be true. *Morris* v. *Smyth*, 202 Va. 832, 120 S.E.2d 465 (1961). The Virginia court has said that the facts in a pleading admitted by a demurrer are "(1) facts expressly alleged; (2) facts which are by fair intendment impliedly alleged; and (3) facts which may be fairly and justly inferred from the facts alleged. . . ." *Ames* v. *American Nat. Bank*, 163 Va. 1, 37, 176 S.E. 204, 215-16 (1934). The court has also said that a written pleading need only be "such as to enable a person of common understanding to know what was intended." *Levitin* v. *Norfolk Nat. Bank*, 163 Va. 694, 701, 177 S.E. 205, 208 (1934). Petitioner's allegations, read in this light, show a prima facie claim of violation of his constitutional right to counsel.

Petitioner alleged that the court tried and sentenced him as a recidivist "without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958" (R. 2). Surely it can be fairly implied or inferred from this that petitioner was without counsel and was financially unable to obtain counsel for himself. Surely a "person of common understanding," particularly a judge familiar with right-to-counsel problems, would so read this petition. And the judge in the Law and Equity Court did so read it. Thus as a matter of Virginia procedure, the petition alleged enough facts to present a claim of unconstitutional denial of counsel within the Fourteenth Amendment.

But since petitioner is claiming a federal right, the sufficiency of his allegations is not entirely dependent on the state's view of the pleading. Even if it could be demonstrated, which it cannot be, that the Virginia court would

hold this petition insufficient to present the federal claim it would still be open for this Court to hold otherwise. For the Supreme Court has the final word on the adequacy of pleadings asserting federal rights in state courts. *E.g.*, *Brown* v. *Western Ry.*, 338 U.S. 294, 296, 299; *First National Bank* v. *Anderson*, 269 U.S. 341, 346.

The Court in several state habeas corpus cases has held sufficient allegations almost identical with those in the case at bar. In *Williams* v. *Kaiser*, 323 U.S. 471, the petition alleged a request for counsel, but there was no mention of indigency. The Court said that it would presume, in the absence of evidence to the contrary, that when petitioner requested counsel he was without counsel and without funds to employ counsel (323 U.S. at 474).[3] The petitioner's allegations in *Tomkins* v. *Missouri*, 323 U.S. 485, likewise omitted mention of financial condition, but the Court sustained the claim. After all, petitioners in cases of this type are asking only that the Court order a hearing; presumably they must still prove indigency in order to establish a violation of federal right. In *Tomkins* the Court pointed out that to hold a layman behind prison walls to the skill of one trained in the law would be to compound the injury caused by the original denial of counsel (323 U.S. at 487). In *Uveges* v. *Pennsylvania*, 335 U.S. 438, the report does not indicate any express averment of indigency; "petitioner alleged that he was not informed of his right to counsel nor was counsel offered him . . ." (335 U.S. at 439). Yet the Court adjudicated the question. And in a recent case the petitioner appears to have averred only that a plea of guilty was induced when he "had no counsel present," but the Court thought this enough to require a hearing. *Wilde* v. *Wyoming*, 362 U.S. 607. It therefore seems clear from

[3] The parallel between *Williams* v. *Kaiser* and the instant case is presented in a table on page 30 of petitioner's brief.

this Court's decisions that petitioner's allegations here are sufficient to present his federal claim.

That indigency is taken for granted in connection with court-appointed counsel is pointedly illustrated by §19.1-241 of the Virginia Code, which reads:

> In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him.

There is not a word here about financial condition. Literally the statute calls for court appointment of counsel whenever the defendant is without representation even though he has a substantial bank account and simply prefers not to spend his money. But it is doubtful that any lawyer or judge in Virginia would seriously think of so administering this provision. The reason seems clear. The statute embodies the universal understanding that court-appointed counsel is provided only for the indigent.

Petitioner here is entitled to the benefit of the same common-sense reading of his pleading. From what he has alleged, indigency can be inferred—for pleading purposes. This is consistent with Virginia law; and the decisions of this Court require it.

2. Respondent's argument that petitioner raised no federal claim in the state courts because he did not specifically mention the United States Constitution in his habeas corpus petition is unsound and overlooks pertinent Virginia pleading rules and appellate practice as well as this Court's decisions. These read with the record reveal that petitioner has adequately invoked the federal constitutional right which he now asserts in this Court.

Petitioner alleged in his habeas corpus petition that he was "unlawfully, unjustly and illegally imprisoned, . . . restrained and deprived of his liberty" by the respondent (R. 1) in that respondent was confining him pursuant to the recidivist sentence imposed on petitioner without counsel (R. 2). It is assumed here, in accordance with the preceding argument, that petitioner has sufficiently alleged facts showing prima facie a claim of denial of the federal constitutional right to counsel. Respondent's point here is not that petitioner has insufficiently pleaded facts but that he has not pleaded law. The argument is that the habeas corpus petition, although it sets out facts showing a claim of federal right, is defective in that it does not go further and invoke explicitly by name the Federal Constitution. There are several valid answers to this argument.

In the first place the Virginia rule, in line with pleading practice generally, is that it is not necessary to plead law when the court will judicially notice the law. The court said in *Shumaker's Administratrix* v. *Atlantic Coast Line Railroad,* 125 Va. 393, 396, 99 S.E. 739, 739-40 (1919):

> It is never necessary to plead any matter of law of which the Court will take judicial notice. It is the function of the pleading to state facts and not law. Our courts take judicial notice of the public acts of Congress as well as of those of the state, and will apply each as appropriate.[4]

[4] In *E. I. DuPont de Nemours & Co.* v. *Snead's Adm'r,* 124 Va. 177, 183-84, 97 S.E. 812, 813 (1919), the court, pointing out that it is "wholly unnecessary" for a party "to say anything about the law of the case," stated: "It is the function of pleadings to state facts, and the court takes judicial notice of the law. The judgment in such cases is but the conclusion of a perfect syllogism, the major (but unexpressed) premises of which is the substantive law, and the minor the fact put in issue by the pleadings." When the facts are stated, "the court will apply the law arising therefrom."

If the Virginia courts take judicial notice of federal legislation, *a fortiori* they take similar notice of the Federal Constitution, which of course binds Virginia judges directly under the Supremacy Clause. In *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, the foundation case for the Court's jurisdiction over state decisions, Justice Story said in response to the jurisdictional argument that the Virginia court had not decided a question under the treaty:

> "... we are bound to consider that the court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice" (1 Wheat. at 360).

Nothing suggests that this pleading principle does not apply to habeas corpus petitions. That it does apply is manifested by the way in which the Law and Equity Court passed on the petition in this case. The judge there had no doubt that the petitioner's allegations invoked a federal right. For the judge expressly applied the Fourteenth Amendment, noting that it was "here relied upon," and ruled that it gave petitioner no right to court-appointed counsel at his recidivist trial, citing *Gryger* v. *Burke*, 334 U.S. 728, and *Chandler* v. *Fretag*, 348 U.S. 3 (R. 9).[5] This is the very ruling complained of by petitioner in this Court. To say now that this question was not appropriately before the state court is to imagine retrospectively that there was some Virginia pleading requirement, unsupported by any

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[5] The opinion of the Law and Equity Court is in the record before this Court (R. 9-12) and was a part of the record before the Supreme Court of Appeals. Rule 5:1, §3(a), Rules of Supreme Court of Appeals. It must be considered in determining that the federal claim was presented to and decided by the state courts. Cf. *Bryant* v. *Zimmerman*, 278 U.S. 63, 67-69.

Virginia decision or legislation, which was either unknown to or ignored by the Virginia trial judge. Surely this Court will not make such an assumption or impose on the Virginia courts a technical pleading requirement which those courts have rejected. In short, in accordance with Virginia practice, a "right . . . claimed under the Constitution" (28 U.S.C. §1257(3)) was raised and decided in the Law and Equity Court. And the claim was preserved in the subsequent proceedings.

But petitioner does not need to rest jurisdiction on this alone. After the denial of the writ in the lower court, petitioner pressed his case through appropriate procedure to the Supreme Court of Appeals of Virginia.[6] In his petition for writ of error, filed in that court, he specifically asserted that he was claiming a right to counsel under "the 14th Article of Amendment of the Constitution of the United States" (R. 21) and that the question was raised under the "Due Process Clause of the 14th Amendment" (R. 23). He set out and discussed relevant decisions of this Court (R. 24-25, 27).[7] On the basis of this petition and the record from the lower court, the highest court of Virginia refused a writ of error and affirmed the judgment denying the habeas corpus petition (R. 29).[8]

In the Supreme Court of Appeals of Virginia a constitutional question can be raised for the first time and adjudi-

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[6] Respondent does not suggest that petitioner in any way failed seasonably to pursue the appropriate procedure for appellate review. Such a contention would be without merit.

[7] Respondent agrees that petitioner asserted the federal question in the Supreme Court of Appeals (Resp. Brief, p. 12).

[8] Concerning petitions for writs of error, §8-476 of the Virginia Code provides in part: "If the court shall deem the judgment, decree or order complained of plainly right, and reject the petition on that ground, the order of rejection shall so state, and no other petition therein shall afterwards be entertained."

cated, even though it was not raised in the lower court. A recent expression of this is in *Almond* v. *Day*, 197 Va. 419, 430, 89 S.E.2d 851, 859 (1955): ". . . we have repeatedly held that the unconstitutionality of a law need not be specially pleaded and may be raised for the first time in this court." See also *Burnette* v. *Commonwealth*, 194 Va. 785, 786, 75 S.E.2d 482, 483 (1953); *Adkins* v. *City of Richmond*, 98 Va. 91, 34 S.E. 967 (1900). In *Speer* v. *Commonwealth*, 23 Grat. (64 Va.) 935 (1873), the appellate court held that on the record from the trial court no constitutional question was raised; however, appellant in his petition for writ of error had supplied an essential fact which did raise for the first time a question under the Commerce Clause of the Federal Constitution, and the court proceeded to decide it. In the *Adkins* case, *supra*, the Virginia court explained the distinction between its practice and that of the United States Supreme Court. It pointed out that the latter Court, because of the particular statutory restriction on its jurisdiction, could not decide a constitutional question not set up or claimed in state courts, but, it noted in comparison, there is no such restriction on the Virginia Supreme Court of Appeals in reviewing lower court decisions. It thus appears under these Virginia cases that constitutional questions, unlike other questions, are allowed to be asserted for the first time in the appellate forum.* This rule of practice coupled here with an actual decision of the federal constitutional question by the lower court establishes this question sufficiently in the record for the Court's jurisdiction. Cf. *Haire* v. *Rice*, 204 U.S. 291, 297-99.

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* The cases do not make clear whether a party has a right to raise a constitutional question for the first time in the appellate court or whether the court only allows this in its discretion. But even if this is a matter of discretion this Court's jurisdiction is not foreclosed, because the state court cannot exercise its discretion to refuse to entertain federal constitutional questions while passing upon kindred issues raised in the same manner. *Williams* v. *Georgia*, 349 U.S. 375, 383.

Thus even if it be assumed that the federal question appears inadequately in the record made in the Law and Equity Court, the federal claim was properly before the highest court of the state since the state law allows a constitutional question to be raised there, although it was not raised below. This satisfies the "specially set up or claimed" provision of §1257(3). See *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649, 651.[10]

Not only was the federal claim now argued in this Court appropriately put before the state court, but its order refusing the writ of error and affirming the denial of habeas corpus necessarily involved a decision of this federal claim adverse to petitioner. Although it likewise involved decision of state questions, there is no independent state ground adequate to support the judgment. Respondent has suggested none, other than his insubstantial points answered in this reply brief. "And when we search for an independent state ground to support the denial, we find none." *Williams* v. *Kaiser*, 323 U.S. 471, 478.

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[10] *Bailey* v. *Anderson*, 326 U.S. 203, is not contrary to this conclusion. There the Court dismissed an appeal from the Supreme Court of Appeals of Virginia for want of a properly presented federal question. The appellant had asserted his federal question for the first time in the state appellate court, and writ of error had been refused without opinion. But unlike the instant case, the federal question had not been passed on by the trial court; the trial record was silent as to the federal issue. In that situation this Court thought itself unable to say that the state court in refusing the writ of error had passed upon the federal question. In the instant case, however, the Law and Equity Court actually adjudicated Chewning's federal claim and denied it; on that record and in face of a petition urging that the federal claim had been erroneously denied the state Supreme Court of Appeals affirmed the decision. That was not the case in *Bailey* v. *Anderson*.

To hold that petitioner's claim of denial of counsel has not been adequately presented in this record would be to burden the assertion of this fundamental right with artificial, unnecessarily narrow, procedural restrictions. The claim stands out in the record for all who can read to see. It has been decided against petitioner by the Virginia court in this proceeding. To require Chewning, an indigent prisoner, to start all over again would only produce a cruel and needless repetition.[11] It would "compound the injury caused by the original denial of counsel." *Tomkins* v. *Missouri*, 323 U.S. 485, 487.

The question of petitioner's right under the Fourteenth Amendment to have counsel at his recidivist trial was properly before the highest court of the state and was necessarily decided by the final decision here under review. This Court has jurisdiction under 28 U.S.C. §1257(3) and should proceed to adjudicate the constitutional issues presented.

Respectfully submitted,

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October, 1961

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[11] If petitioner filed a new habeas corpus petition in the Virginia state court attacking the same sentence on the same ground—denial of right to counsel—there is a distinct possibility that he would be met with a res judicata objection, since the Virginia court has actually adjudicated the issue on both federal and state grounds. See *Petrus* v. *Robbins*, 196 Va. 322, 329-30, 83 S.E.2d 408, 412 (1954); *Ferebee* v. *Hungate*, 192 Va. 32, 36-37, 63 S.E.2d 761, 764 (1951). This is further indication that the present judgment is reviewable.

SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1961.

Morgan C. Chewning, Petitioner, *v.* W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary.	On Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia.

[February 19, 1962.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was sentenced to 10 years in prison under Virginia's recidivist statute. Va. Code, 1950, § 53–296. This statute provides that when it appears that a person, convicted of an offense, has been previously sentenced "to a like punishment," he may be tried on an information that alleges "the existence of records of prior convictions and the identity of the prisoner with the person named in each." The statute goes on to provide that the prisoner may deny the existence of any such records, or that he is the same person named therein, or both.

If the existence of the records is denied, the court determines whether they exist. If the court so finds and the prisoner denies he is the person mentioned in the records or remains silent, a jury is impaneled to try that issue. If the jury finds he is the same person and if he has one prior conviction, the court may sentence him for an additional term not to exceed five years. If he has been twice sentenced, the court may impose such additional sentence as it "may deem proper."

Petitioner, then imprisoned in Virginia, was charged with having been three times convicted and sentenced for a felony. He was accordingly tried under the recidivist

statute; and he is now serving the sentence imposed at that trial. He brought this habeas corpus proceeding in the Virginia courts to challenge the legality of that sentence. The crux of his complaint was that he was tried and convicted without having had the benefit and aid of counsel, though he had requested one.[1] The Law and Equity Court of Richmond denied relief; and the Supreme Court of Appeals of Virginia refused a writ of error. While the grounds for the action of the Supreme Court of Appeals are not disclosed, the Law and Equity Court wrote an opinion, making clear that it ruled on the federal constitutional claim:

> "As to the mandate of the Fourteenth Amendment to the Constitution of the United States, here relied upon, the converse has been adjudicated. In Gryger v. Burke, 334 U. S. 728, where release or habeas corpus was sought on the ground that petitioner was without counsel at his recidivist hearing, Mr. Justice Jackson said, in part, as follows (at p. 731):
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> "'. . . the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid.'
>
> "This holding was adhered to in Chandler v. Fretag, 348 U. S. 3, where it was decided that, while a State is not required under the Fourteenth Amendment to furnish counsel, it cannot deny the defendant in a repeater hearing of the right to be heard by counsel of his own choice."

The Law and Equity Court, while conceding that a proceeding under the recidivist statute was "criminal" and that in that proceeding the accused was entitled to most

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[1] He apparently did not appeal from the conviction. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S. E. 2d 810, however, allows the deprivation of a constitutional right to be raised by habeas corpus.

of the protections afforded defendants in criminal trials, concluded that petitioner was not entitled to have counsel appointed to assist him, since the proceeding was "only connected with the measure of punishment for the last-committed crime." Cf. *Fitzgerald* v. *Smyth*, 194 Va. 681, 689–690, 74 S. E. 2d 810, 816.

We put to one side *Gryger* v. *Burke*, *supra*, on which the Virginia court relied. In that case, identity was the only issue and the specialized circumstances seemed to a majority not to require the appointment of counsel. Under the present recidivist statute, the situation is quite different. As we have seen, the "existence" of records of prior convictions of the kind described in the statute is an issue tendered in Virginia. We said of a like issue in *Reynolds* v. *Cochran*, 365 U. S. 525, 531, ". . . if petitioner had been allowed the assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple-offender proceeding." In that case we also pointed out that the issue of "identity" may at times present difficult local law issues, as for example "whether the second-offender statute may be applied to reimprison a person who has completely satisfied the sentence imposed upon his second conviction and has been discharged from custody." *Id.*, p. 532.

In *Reynolds* v. *Cochran*, *supra*, the accused had his own lawyer and only asked for a continuance. But the holding in the case applies equally to an accused faced with an information under Virginia's recidivist statute and who has no lawyer. It is "the nature of the charge" (*Tomkins* v. *Missouri*, 323 U. S. 485, 488) that underlines the need for counsel. In trials of this kind the labyrinth of the law is, or may be, too intricate for the layman to master. *Id.*, pp. 488–489; *Williams* v. *Kaiser*, 323 U. S. 471, 474. Virginia has held that the validity of any of

the prior convictions, used to bring the multiple-offender statute into play, may be inquired into. See, *e. g.*, *Wesley* v. *Commonwealth*, 190 Va. 268, 272–274, 56 S. E. 2d 362, 364. These may involve judgments of conviction in any state or federal court in the Nation. Counsel, whom we appointed to represent petitioner here, has shown the wide variety of problems that may be tendered. In Virginia, a trial under this statute may present questions such as whether the courts rendering the prior judgments had jurisdiction over the offenses and over the defendant and whether these offenses were punishable by a penitentiary sentence. *Wesley* v. *Commonwealth*, *supra*, p. 273. In Virginia, a sentence in excess of the one the court rendering it had power to impose is "void for the excess only." See *Royster* v. *Smith*, 195 Va. 228, 235, 77 S. E. 2d 855, 858–859. In Virginia, a court in considering whether the prior convictions afforded a proper basis on which to invoke the recidivist statute has considered whether, in a prior trial, the defendant was represented by counsel and whether it was a fair and impartial trial. *Willoughby* v. *Smith*, 194 Va. 267, 271, 72 S. E. 2d 636, 639. In Virginia, a prior conviction that is on appeal may not be the proper basis for a recidivist charge. *White* v. *Commonwealth*, 79 Va. 611. And there appears to be a question whether two prior convictions rendered the same day or at the same term could both be used in a Virginia multiple-offender prosecution. *Commonwealth* v. *Welch*, 4 Va. 57. See *Dye* v. *Skeen*, 135 W. Va. 90, 102–103, 62 S. E. 2d 681, 688–689.

Double jeopardy and *ex post facto* application of a law are also questions which, as indicated in *Reynolds* v. *Cochran*, *supra*, p. 529, may well be considered by an imaginative lawyer, who looks critically at the layer of prior convictions on which the recidivist charge rests. We intimate no opinion on whether any of the problems mentioned would arise on petitioner's trial nor, if so, whether

any would have merit. We only conclude that a trial on a charge of being a habitual criminal is such a serious one (*Chandler* v. *Fretag*, 348 U. S. 3), the issues presented under Virginia's statute so complex, and the potential prejudice resulting from the absence of counsel so great that the rule we have followed concerning the appointment of counsel in other types of criminal trials [2] is equally applicable here.

Reversed.

[For opinion of MR. JUSTICE HARLAN concurring in the result see Nos. 56 and 57, *Oyler* v. *Boles* and *Crabtree* v. *Boles*.]

[2] *Williams* v. *Kaiser*, *supra*; *Tomkins* v. *Missouri*, *supra*; *Townsend* v. *Burke*, 334 U. S. 736; *Hudson* v. *North Carolina*, 363 U. S. 697; *McNeal* v. *Culver*, 365 U. S. 109.